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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

OF THE

STATE OF MISSOURI,

FROM MAY 20, 1889, TO DECEMBER 2, 1889.

REPORTED BY

DAVID GOLDSMITH, of the St. Louis Bar,

AND

BEN ELI GUTHRIE, of the Macon City Bar,

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JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. RODERICK E. ROMBAUER, *Presiding Judge.*

HON. SEYMOUR D. THOMPSON, } *Judges.*
HON. WILLIAM H. BIGGS, }

JOHN LEWIS, *Clerk.*
DAVID GOLDSMITH, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. J. L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON, } *Judges.*
HON. T. A. GILL, }

FINIS C. FARR, *Clerk,*
BEN ELI GUTHRIE, *Reporter.*

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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1889.

J. P. HOUSTON, Respondent, v. MYRON WOOLLEY, Appellant.

Kansas City Court of Appeals, May 20, 1889.

37	15
38	85
37	15
55	390

1. **Attachment:** MOTION TO QUASH. To an attachment proceeding on the grounds of non-residency of the defendant in aid of an action for damages for sending and publishing libellous and threatening letters, defendant made a special appearance and moved to quash the attachment on the grounds, (1) that the cause of action stated in the petition arose in tort and not upon debt or civil liability nor from the commission of any act or misdemeanor, and (2) that the petition did not state a cause of action, *Held*,

   (1) Said motion was properly overruled for the reason it did not in any way draw in question the regularity or sufficiency of the attachment proceeding.

   (2) That plaintiff was only required to file a good and sufficient affidavit, and had a right to select any other ground or grounds that existed, rather than the torts alleged in the petition, if he so desired.

   (3) That a special plea in abatement, thereupon filed, alleging substantially the same grounds as those set forth in the motion to quash, was properly stricken from the files on motion of plaintiff, because it did not put in issue the truth of the facts alleged in the affidavit nor affirmatively plead any abatable matter.

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(4) **That as to the plea to the jurisdiction next filed, denying the court's jurisdiction of the person and property of the defendant, the finding of the court against the defendant is presumed to be correct, in the absence of a showing to the contrary in the bill of exceptions. *Quaere:* whether such plea should not be treated as an answer.**

2. **Pleading: PETITION: SENDING THREATENING AND LIBELLOUS LETTER. Each count of the petition in this case, for sending and publishing threatening and libellous letters, is examined under an application of the rules laid down by the authorities, and found to contain sufficient statement of a cause of action.**

3. **Judgment: SPECIAL CHANGED TO GENERAL. As the trial court rendered a special judgment against the attached property, this court modifies the same so as to make it general.**

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED (*as modified*).

William A. Wood, for the appellant.

(1) Attachment cannot be grounded upon an action *ex delicto*, except where the injuries sued for grow out of the commission of a felony or misdemeanor, or for the seduction of a female, and only in these excepted cases because clearly defined by statute to be basis of attachment. The case at bar is an action of libel, and the only ground of attachment, alleged by plaintiff's affidavit, is the non-residence of the defendant. Non-residence is only ground for attachment in actions founded upon some actual existing indebtedness, and not in actions like this to recover unliquidated damages. Defendant's plea in abatement properly raised these issues, and it was error for the court to strike it out. *McDonald v. Forsyth*, 13 Mo. 549; *Bachman v. Lewis*, 27 Mo. App. 81; Drake Attach. [6 Ed.] secs. 19, 13–32, 23–26 and 27*a*. (2) There was no personal service, and there being nothing on which to base the attachment, and no appearance to the merits

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by the defendant, the trial court had no jurisdiction. Defendant had the right to make all the special pleas made, and did not thereby give the court general jurisdiction as held by the court on the plea to the jurisdiction. (3) Upon the record herein the trial court committed error in holding, upon the plea to the jurisdiction, that the court had jurisdiction of the property and "also of the person" of the defendant. There is shown neither service nor appearance to support such finding. (4) After finding that the court had jurisdiction of the person of the defendant, the court committed error in rendering a special judgment against the attached property. *Kritzer v. Smith*, 21 Mo. 296; *Borum v. Reed*, 73 Mo. 461; *Maupin v. Mining Co.*, 78 Mo. 24; *Payne v. O'Shea*, 84 Mo. 129. Under the law announced in *Phillips v. Stewart* (69 Mo. 149), the court committed an error in ordering the attached property sold after finding that the court had general jurisdiction and rendering a general judgment. (5) The petition of plaintiff fails to state a cause of action in either count; the first count fails to set out any of the matter complained of, and the matter set out in the second count is not actionable *per se*, and there is nothing to explain either count or apply the matter complained of to plaintiff. The special damage plead in first count does not cure the defects. *Legg v. Dunlevy*, 10 Mo. App. 461; s. c., 80 Mo. 558; *Wood v. Hilbish*, 23 Mo. App. 389; *Salvatelli v. Ghio*, 9 Mo. App. 155; *Christal v. Craig*, 80 Mo. 367; *Steineke v. Marx*, 10 Mo. App. 581, s. c., 8 Mo. App. 561; Odgers on Libel and Slander (Bigelow), secs. 118-19-20-21 and 473. (6) Defendant's plea in abatement presented issues which should have been heard and determined by the court on the trial of the attachment, and the court committed error in striking out said plea.

Robinson, O'Grady & Harkless, for the respondent.

(1) Actions *ex delicto* may be brought by attachment. R. S. 1845, p. 133, sec. 1; R. S. 1855, p. 238, sec. 1; R. S. 1879, p. 61, sec. 1; *Davidson v. Owens*, 5 Minn. 69; *Finly v. Bryson*, 84 Mo. 669. (2) If the judgment be not in due form this court should correct it, as all the facts are in the record and admitted by the parties. R. S. 1879, sec. 3776, with a great number of cases construing this statute. *Phillips v. Stewart*, 69 Mo. 149. (3) The first count in the petition states a cause of action. *Grimes v. Gates*, 47 Vt. 594, s. c., 19 Am. Rep. 129. (4) The second count sets forth a good action for libel. The words in the letter are actionable *per se*. *Burch v. Benton*, 26 Mo. 153; *Currey v. Collins*, 37 Mo. 328; *Bundy v. Hart*, 46 Mo. 462. (5) The plea in abatement raised no issue proper to be tried under that plea, and hence was properly stricken out. R. S. 1879, sec. 438; *Burnett v. McCluey*, 92 Mo. 235 and 236; *Cohn v. Lehman*, 93 Mo. 574. We ask that the judgment be modified and affirmed, as was done in 69 Mo. 149

SMITH, P. J.—This was an action of attachment brought by the plaintiff against the defendant in the circuit court of Barton county to recover damages. The petition contains two counts, the first of which alleged that on the eighteenth day of October, 1887, Myron Woolley, the defendant herein, did wrongfully and maliciously write, compose and send to plaintiff herein, a certain letter containing wicked and scandalizing language concerning the plaintiff, and did, with the intent to frighten said plaintiff, therein threaten to have the plaintiff arrested and imprisoned in the state's prison, and did threaten to accuse the plaintiff of crimes punished by imprisonment, 'and did threaten him with great bodily injury; which said letter was received by the plaintiff. And plaintiff says that by reason of the premises he was terrified, frightened and injured, and

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thereby suffered great loss. That at the time he so received said letter he was advanced in years and very feeble in health, and nervous and unable to endure so great grief and annoyance as other men, which facts the said defendant well knew and took advantage of. And plaintiff says that by reason of the wicked, scandalous and threatening matter contained in said letter as aforesaid, he was made sick and unable to attend to his usual business, and perform his usual work, and was also put to great expense and trouble in preparing to defend himself against the threatened and unlawful prosecution of himself by the defendant herein, to plaintiff's damage in the sum of five hundred dollars, for which sum plaintiff prays judgment.

The second count alleged that the defendant was the author and sender of another false and libellous letter of and concerning the plaintiff, which said letter is in words and figures as follows, to-wit:

"STREATOR, October 18, 1887

"*J. P. Houston, Lamar, Mo.*

"SIR:—It is with pleasure that I announce to you that Judge Dodge has taken our case; the judge holds that you are a partner in the crime, and that you are jointly and separately liable to both criminal and civil prosecution. The judge says that the correspondence fully explains and defines the positions occupied by all parties. Mr. Houston, if you and the other parties wish to protect your liberty and your property, you must return our money, eight hundred and fifty dollars, at once. You will find that in dealing with Judge D., the Hon. Mark D. Wilbur, and the U. S. court, that you are not engaged in your favorite pastime of swindling old and helpless men. Judge Dodge says that your conduct was all the more reprehensible from the fact that father was your guest and at the house of a friend. Mr. H., I have no desire to disgrace you in your old age, and in compromising with you, Judge Dodge says would be a great act of mercy.

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"If our money is sent back, we will deed the place to M. N. Wills, and let the matter drop. We offered the place for sale at one-half the cost, but that was to get money to prosecute with. We do not need money now, as the judge will furnish all that is needed.

"Yours, etc.,

"MYRON WOOLLEY."

And plaintiff says that the said defendant did publish the contents of said letter abroad to, and in the hearing of, divers and sundry persons, by reason of which libellous publication by the defendant as aforesaid, the plaintiff says he is injured in the sum of five hundred dollars, for which said sum he prays judgment.

The affidavit for the attachment alleged that the plaintiff had "a just cause of action against the defendant therein now due, and that the amount which he believed he ought to recover after allowing all just credits and set-offs is five hundred dollars," and that "the defendant is not a resident of the state of Missouri."

The defendant, limiting his appearance for that purpose, filed a motion to quash the attachment on the grounds, (1) that the cause of action stated in the petition arose in tort and not upon any debt or civil liability, nor from the commission of any act or misdemeanor, and (2) that the petition did not state a cause of action, which motion was by the court overruled.

The defendant then, again limiting his appearance, filed what is characterized as a special plea in abatement, wherein were alleged as grounds for abating the attachment substantially the same as those set forth in the motion to quash, which upon motion of the defendant was stricken out by the court.

The defendant then filed what is designated as a plea to the jurisdiction of the court, wherein it was denied that the court had jurisdiction either of the person or the property of the defendant. This plea was submitted to the court upon which the finding was adverse to the defendant.

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Upon this state of the record the case was proceeded with to trial and judgment.

The judgment recites that "the cause coming on to be tried on the merits, and both of the parties appearing by their respective attorneys, and the court, after hearing all the evidence offered and argument of counsel," found two hundred and fifty dollars for plaintiff on each count of the petition, etc. The judgment was special against the attached property. After the usual motions for a new trial in both branches of the case were overruled, the defendant prosecuted his appeal from the judgment to this court.

I. As to the defendant's motion to quash the writ of attachment, it is only necessary to say that it was properly overruled for the reason that it did not in any way draw in question the regularity or the sufficiency of the attachment proceeding. Evidently the motion was based upon a misconception of the provisions of the statute, section 398, which declares that the plaintiff "in any civil action" may have an attachment against the property of the defendant "in any one or more" of the fourteen cases therein enumerated. It is quite plain that the plaintiff was entitled to the process of attachment on compliance with the requirements of the statute, one among which was (sec. 403), to make an affidavit specifying one or more of the several grounds mentioned in section 395.

It is quite true that he did not make the torts alleged in his petition, or either of them, which he probably might have done, a ground or grounds of the attachment. R. S., secs. 1591, 1592, 1593. He had the right to select any other ground or grounds that existed. There is no rule of practice forbidding this.

He was only required to file a good and sufficient affidavit embracing some one or more of the statutory causes, which he did. *Bachman v. Lewis*, 27 Mo. App. 81, lends no support to the contention of the defendant.

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That was a suit in equity against a married woman, and in aid thereof the process of attachment was sued out upon three distinct grounds. The defendant filed a plea in abatement putting in issue the truth of the facts alleged in the affidavit, and further alleging as a cause of abatement that she was a married woman. Upon the evidence given under these issues the trial court found for the defendant. The judgment was affirmed here. The simple stating of the case shows that it is not in point. There the jurisdiction of a court of law was invoked to subject the property of a married woman to the payment of an alleged indebtedness. Of course this could not be done for the court was not invested as a court of law with any such jurisdiction. The words "any civil action" as employed in section 398 are to be reasonably construed, and a construction that would bring within their scope and meaning the ancillary proceeding by attachment, which is exclusively legal, against the property of a married woman, would obliterate the line of demarcation between the jurisdiction of courts of law and those of equity, which of course would be unreasonable and not to be tolerated. Hence the case referred to decides nothing militating against the views herein expressed.

The decisions of the courts of last resort in the various states, though not harmonious, have been largely influenced by statute, and however the law may be in any one of the states, we think that in view of the fact that our statute is remedial in its character, in connection with its history, showing that it has been amended from time to time, making it more comprehensive in its terms until enacted in its present broadness, that its meaning must be held to be what its words plainly imply. R. S. 1849, p. 133, sec. 1; R. S. 1855, p. 238, sec. 1; R. S. 1879, p. 61, sec. 398; *Finly v. Bryson*, 84 Mo. 664.

II. And as to the defendant's so-called plea in abatement, it may be remarked as it did not meet the

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requirements of the statute, section 438, by putting in issue the truth of the facts alleged in the affidavit nor affirmatively plead any abatable matter, that it was properly stricken from the files of the court. It was in the nature of a demurrer to the petition, presenting substantially the same grounds as those contained in the motion to quash, and did not in any way question the legal sufficiency of the affidavit as seems to have been supposed. The defendant's plea to the jurisdiction of the court, over the person and the property of the defendant, went to the whole case. Whether this pleading should, under the present construction of the practice act, have been treated as an answer (*Thompson v. Bronson*, 17 Mo. App. 456; *Byler v. Jones*, 79 Mo. 261; *Little v. Harrington*, 71 Mo. 391) it is not necessary for us to here decide. The court's finding was adversely thereon to the defendant, and we must, in the absence of anything in the bill of exceptions showing to the contrary, presume the same to be correct.

III. The defendant for the first time here questions the sufficiency of the petition on the ground that neither count states a cause of action. The plaintiff cites *Givens v. Gates*, 47 Vermont, 594, as an authority showing the first count of his petition is not obnoxious to the objection which the defendant here lodges against it. Upon an examination of this decision we find it to be quite well considered, and to rest upon a number of English authorities where principles are stated which fully support it. 3 Black Com. 120; 2 Com. Dig. Battery D.; Jacobs' Law Dict., Tit. Threats; Bouv. Law Dict., Tit. Menace; *Queen v. Woodward*, 11 Mod. 137; 3 Chitty, Crim. Law, 607; *King v. Southerton*, 6 East, 127; Coke, Litt. 253*b*.

Upon reason and authority we think the first count of the petition states a cause of action.

And we likewise think the second count of the petition stated a good cause of action.

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Are the words of the letter set forth in *haec verba* in the court actionable *per se?* If so, then the statement of the cause of action thereon was sufficient.

In actions of this kind, the plaintiff must show a cause of action subject to the rule that the words, when taken fairly and in their ordinary sense (*Salvatelli v. Ghio*, 9 Mo. App. 9; *Johnson v. Dispatch Co.*, 2 Mo. App. 565), impute an indictable offense for which corporal punishment may be inflicted. *Birch v. Burton* 26 Mo. 153; *Curry v. Collins*, 37 Mo. 328; *Bundy v. Hart*, 46 Mo. 462.

The writing and sending of a libellous writing to the libeled is a publication. R. S., sec. 1593. The words of the letter set forth in the petition impute to the plaintiff a crime for which he may be indicted and corporally punished. They bring the case within the rule referred to. Besides this it is likely the said count would be held good under the statute defining libel. Sec. 1591. This section was introduced into the statutes since the decisions defining libel to which we have referred.

The conclusion is therefore that the judgment of the circuit court, being special, should be modified here so as to make it general (R. S., sec. 3776); it is ordered accordingly affirmed. All concur.

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MARGARET GARR *et al.*, Defendants in Error, v. JAMES B. HARDING, Plaintiff in Error.

Kansas City Court of Appeals, May 20, 1889.

1. **Administration: ADMINISTRATOR COLLUDING IN ALLOWANCE OF FRAUDULENT CLAIM.** On final settlement, the probate court is justified in disallowing a payment made by an administrator on a false and fraudulent claim theretofore allowed by the court, when it is shown to have been allowed by the collusive practices and actual bad faith of such administrator.

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2. ——— : COLLATERAL ATTACK OF JUDGMENT. The investigation of such fraudulent and collusive allowance and the disallowance of payment thereon does not constitute a collateral attack on the judgment of allowance. The inquiry only goes to the good or bad faith of the administrator touching the judgment. If this is the product of his bad faith, he cannot be allowed for its payment.

3. **Appellate Practice:** ERROR IN JUDGMENT. Where there is error in the entry of the judgment, this court may reverse and remand the cause with instruction to enter up a judgment in proper form.

Error to the Putnam Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED AND REMANDED (*with directions*).

Statement of the case.

Until his death, in May, 1882, one Joseph McCalment resided, with his wife, Mary, and a son, Luther McCalment, on a farm in Putnam county, Missouri. Just before his death, it seems, the old man, Joseph McCalment, conveyed this land to the son, Luther, but shortly after such death, the remaining children, and heirs, by a successful suit in court, had this conveyance set aside.

Thereupon Luther McCalment, and the widow Mary McCalment (who continued to live with Luther), had allowed by the probate court of Putnam county certain claims against the estate of said Joseph McCalment, deceased—to said Luther there was allowed $1,130.69, and to the widow Mary, eight hundred and forty-five dollars.

These plaintiffs (so designated in this suit), Mrs. Garr, and others, compose the other legal heirs of said Joseph McCalment. The defendant (so-called in the style of this action), Jas. B. Harding, was, all the time of the settling the affairs of the estate, administrator, and continues so to be.

When the claims of Luther McCalment and his mother, Mary, were presented and allowed in the probate

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court, it is claimed by these plaintiffs, that by collusion between said claimants and the administrator Harding, they were denied the opportunity to contest such claims. However, they were appealed to the circuit court, but there the appeals were dismissed by the administrator, without any hearing, and contrary to the expressed desire of such contesting heirs.

Immediately upon the allowance, Mrs. Mary McCalment, the widow, assigned her claim over to Luther, so that he became owner as well of his mother's allowed claim of eight hundred and forty-five dollars, and his own of $1,130.69. It seems the farm lands belonging to the estate were then sold, under order of court to pay debts, and of the proceeds, Harding, the administrator, paid over to Luther McCalment, seven hundred and five dollars—on the claim of Mary McCalment of eight hundred and forty-five dollars, which had been assigned by her to Luther.

At the November term, 1885, of the Putnam probate court the administrator Harding presented his final settlement, and therein claimed credit for seven hundred and five dollars paid to Luther McCalment, on account of the eight hundred and forty-five-dollar claim allowed Mary McCalment, and by her assigned to said Luther. These plaintiffs, being all the other heirs of said estate, duly filed their exceptions to the allowance of said final account, charging fraudulent collusion between Harding the administrator, and said Luther and Mary McCalment to impose illegal and fraudulent claims upon the said estate. At the hearing had in the probate court the exceptions were overruled and the settlement approved. The matter was then appealed to the circuit court, and there, upon a trial had, the court found against the administrator, as to said item of seven hundred and five dollars, paid on account of the eight hundred and forty-five-dollar claim, but the record entry adjudges eight hundred and forty-five dollars as against the defendant Harding.

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The administrator Harding brings the case here by writ of error.

A. W. Mullins, for the plaintiff in error.

(1) The allowance of the demand in favor of Mary McCalment, by the probate court, had the same force and effect as a judgment rendered in the circuit court of this state. 1 R. S. Mo., sec. 102, p. 30; *Smith v. Sims*, 77 Mo. 269, 272; *Sheetz v. Kirtley*, 62 Mo. 417. And such judgment could not, by any proceeding, be set aside or vacated on the ground that Mrs. McCalment had no legal or valid claim against the estate for the money her husband had received from her, but only for fraud in obtaining the allowance. *Sheetz v. Kirtley*, 62 Mo. 417, 420; *Smith v. Sims*, 77 Mo. 269; Freem. Judg., sec. 489. It can readily be inferred from the record in this case, that the ruling in the circuit court was predicated on the theory that the money Joseph McCalment obtained from his wife became, and was, his absolutely by reason of the marital relation. In this the court was in error. *Clark v. Clark*, 86 Mo. 114; *McCoy v. Hyatt*, 80 Mo. 130; *Welch, Adm'r, v. Welch*, 63 Mo. 57; *Botts v. Gooch*, supreme court of Mo. October term, 1888, not yet reported. (2) Probate courts have no equity jurisdiction, and therefore no competent power to vacate or set aside judgments allowing demands against estates after the term at which they are allowed. *Presbyterian Church v. McElhiney*, 61 Mo. 540. And the circuit court on an appeal from a probate court has no other or greater jurisdiction in the matter of the appeal than the probate court. If, therefore, it is sought to impeach a judgment in a case like that under consideration, resort should be had to the circuit court, and there proceed by proper petition in equity, *Jones v. Brinker*, 20 Mo. 87; *State to use v. Roland*, 23 Mo. 95; *Oldham v. Trimble*, 15 Mo. 225. (3) The judgment rendered by the circuit court is irregular and wholly unauthorized by

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law. The proceeding on the appeal was to review the administrator's final settlement, and that being done to certify back to the probate court the record and proceedings of the circuit court. 1 R. S. Mo., secs. 299, 300, p. 44. But instead of so proceeding the circuit court rendered a general personal judgment against the administrator, in favor of a part of the heirs of the deceased for eight hundred and forty-five dollars. This was certainly wrong, and such judgment cannot stand. *Ranney, Adm'r, v. Thomas*, 45 Mo. 111; *Finney, Adm'r, v. The State to use*, 9 Mo. 225.

Huston & Parrish, for the defendant in error.

(1) The final settlement is the appointed time for the administrator to settle his stewardship with the heirs. Before that time they have no voice—cannot be heard. *Picot v. Biddle*, 35 Mo. 29; *State v. Lankford*, 55 Mo. 564; *Ritchy v. Withers*, 72 Mo. 557; *In re Davis*, 62 Mo. 450. (2) When the final settlement is made and approved, then it becomes a final judgment between the administrator and the heirs, and all matters of defense to credits claimed and allowed in that settlement are cut off in that or any other court—the heirs have then had their day in court. (3) In wrong doing all are principals, and the final settlement is the first time the heirs had the opportunity to be heard on this matter. All done previously was *ex parte* as to them, (4) This is not a proceeding to set aside an allowance; it in no way affects the allowance; it is simply an invocation of the doctrine of estoppel. If the administrator fraudulently colluded to procure the allowance he ought not to have credit for it. *Dullard v. Hardy*, 47 Mo. 404. This case settles the controversy here in favor of the defendants in error. It is directly in point. (5) If the final settlement is made, then all fraud on the part of the administrator antecedent to the final settlement, and not immediately connected with such settlement, is

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gone and settled so far as recourse on him is concerned. The only remedy then remaining would be against the fraudulent claimant. The final settlement would whitewash the administrator. *Sheetz v. Kirtley*, 62 Mo. 417, and cases there cited; *Miller v. Major*, 67 Mo. 247. If the doctrine contended for by plaintiff in error is correct, then the administrator goes free and the heirs are compelled to sit still when cited in at a final settlement,—see a claim for credit on account of a fraudulent and collusive allowance admitted, and are powerless to prevent it. (6) The case of *Sheetz v. Kirtley*, cited by plaintiff in error, is not in point. That was a final settlement, which was invoked. *Smith v. Simms*, also cited, is not in point. When the administrator asks credit on account of an allowance, he has assisted in procuring in fraud of the estate, then, upon his fraud appearing, he is estopped from obtaining credit, though the allowance is not acted upon at all. He is entitled to a credit for allowances paid by him, unless such allowances have been fraudulently obtained by his collusion and fraud. (7) The court did not err in rendering judgment against the administrator personally. Judgment "*de bonis testatoris*" is only proper where the administrator is sued by a creditor of the estate. Here he has wasted the estate and has no funds. It is that very matter we complain of, hence judgment goes and must go against him personally, and this judgment, which is equivalent to a disallowance of the fraudulent claims of credit *pro tanto*, should be certified back to the probate court. But, in any event, that matter would only be cause to modify the judgment. It would not be ground for reversal. *Seymour v. Seymour*, 67 Mo. 303. (8) Upon the whole record the judgment is for the right party; a most infamous conspiracy has met with a just rebuke, and a fraud has been successfully throttled.

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GILL, J.—Although the record entry of judgment in the circuit court is awkwardly framed, it was clearly the intention of that court to disallow the amount claimed as paid on the claim of eight hundred and forty-five dollars. And we shall assume that such claim was rejected for the reasons presented by the exceptant heirs (these plaintiffs), to-wit: That it was an unjust, illegal and fraudulent claim charged upon the estate by and through the bad faith and fraudulent collusion of the administrator. There is in fact but one material point here for our consideration, since the testimony, as brought up in this record, well sustains the facts, as above found by the trial judge. The question is this: Is the court, having charge of the settlement of estates of deceased persons, justified in disallowing a payment made by an administrator on a false and fraudulent claim theretofore allowed by the probate court, when it is shown to have been there allowed by the collusive practices and active bad faith of such administrator? To the credit of those administering estates, it can be said that the books are almost barren of exact precedents. But to the credit of the law, be it said, however, that in the two cases cited (and all that industrious and skilful counsel have been able to cite), which present this question, the courts have answered our *quære* in the affirmative.

In *Dullard, Adm'r, v. Hardy, Adm'r*, 47 Mo. 403, is reported a case, the one feature of which is quite parallel, in principle, to the point here. The administrator, knowingly, and fraudulently, permitted, without objection, an insolvent claimant to prove up a claim of two hundred and fifty dollars against the estate, when, as he knew, there was a valid set-off of two hundred dollars, and the estate therefore only owed the claimant fifty dollars instead of two hundred and fifty dollars. However, the administrator concealed this knowledge, permitted the fraudulent judgment for two hundred and fifty dollars, and, having paid the same, asked an allowance in his accounts.

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The item was disallowed by the probate court for another reason, but the supreme court held that it may have been rejected for the reason that the administrator thus fraudulently consented to the unjust allowance. In answer to the suggestion that such judgment of allowance could not thus be collaterally attacked, among other things, the court in case *supra* said: "If the payment was made corruptly, and with a view to hamper, embarrass and defraud the estate in respect to the set-off, I do not think, under the circumstances already adverted to, that the *judgment* can be successfully invoked in justification of the fraud." It was there said too: "That the judgment of allowance and classification is not assailed, although the evidence shows that it ought never to have been rendered." So here the judgment will stand, and yet this unfaithful trustee will not be permitted to get credit for paying what he knew to be an unjust charge, imposed on the estate by means of his own fraudulent practices.

A like opinion, in a similar case, was held in a late case in New Jersey. *Hurlburt v. Hutton*, 15 At. Rep., p. 417. Says the court: "There can be no objection to an inquiry as to the good faith of the executors of the estate of Mr. Hutton touching this judgment. If it was the product of bad faith, on their part, they cannot be allowed for its payment. This is not an inquiry as to the validity of the judgment, etc. * * * If the judgment was not the product of their bad faith to the estate, they should have the desired credit, but if it was concocted by them, or with their assent, for the purpose of charging the estate unduly, they should not be allowed the credit they ask."

Following then the spirit of these adjudications, we cheerfully approve the finding and holding of the circuit court. But, owing to the erroneous entry of its judgment we shall reverse and remand the cause with instructions to that court, to enter up a judgment in proper form, disallowing and disapproving the final

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settlement of Harding, the administrator, in so far as the credit of seven hundred and five dollars is concerned, and to certify such ruling and judgment to the probate court of Putnam county. The other judges concur.

J. W. Hawk *et al.*, Respondents, v. Nelson P. Applegate, Appellant.

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Kansas City Court of Appeals, May 20, 1889.

1. **Evidence:** RULE AS TO ADMISSIBILITY OF DECLARATIONS OF AGENT. The declarations of an agent are admissible in evidence against his principal when a part of the transaction he is engaged in for his principal at the time, and the declarations of an agent admitted in this case are examined and *held* to fall within the rule.

2. **Execution:** ELECTION TO REPLEVIN OR TO CLAIM UNDER THE STATUTE. The owner of goods seized under execution against another has his election to replevin the same out of the hands of the constable, or, to pursue his remedy under the execution statute by notifying the officer of his claim, permitting the goods to go to sale and suing on the indemnifying bond for damages; and his right of election cannot be defeated by the execution plaintiff's giving the indemnifying bond, without the owner's having made the statutory claim to the property after the levy; and what proceedings may have taken place as to other and prior levies are wholly immaterial.

3. ——— : PURCHASE PRICE : ESTOPPEL. While personal property is subject to execution for the price thereof except in the hands of an innocent purchaser for value, without notice of such prior claim, yet the position of one who has notice of such prior claim, and who, desiring to buy, is informed by the execution creditor that he would look to the original purchaser and not to the property for the purchase money, and upon the faith of such assurance buys and pays for the property, is not different from that of an innocent purchaser for value without notice, and the estoppel raised by the pleading and evidence in this case was properly submitted to the jury.

Appeal from the Putnam Circuit Court.—Hon. Andrew Ellison, Judge.

Affirmed.

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A. W. Mullins, with *J. E. Burnham*, for the appellant.

(1) The circuit court erred in admitting in evidence the alleged statements of F. H. Smith, agent for the David Bradley Manufacturing Company, as testified to by the plaintiff, J. L. Hawk. It had not been shown, and was not shown by the evidence, that Smith was authorized to make such statement on behalf of his employer. And any acts done or statements or declarations made by an agent must be authorized by the principal, otherwise the principal cannot be bound thereby. *Fougue v. Burgess*, 71 Mo. 389, 390; *McDermott v. Railroad*, 87 Mo. 285; Story, Agency, secs. 134, 451. (2) The record shows that the Hawk Brothers and Roth claimed the property in question after it was levied on by the constable under the executions in favor of the David Bradley Manufacturing Company and against L. K. Flannagan & Co., and delivered to the constable a written notice of such claim verified by their affidavit; and that the said plaintiff in said executions, by reason of such claim being made, executed a bond of indemnity to the constable, with good security, approved by him. The record also shows that this bond was returned to the justice with the said executions issued by him. Such bond having been given the said claimants, the plaintiffs, in this case, were precluded and barred of any right of action against the constable, the defendant herein. It therefore follows that the circuit court erred in giving plaintiff's first instruction, and, also, in refusing to give defendant's second instruction. R. S., secs. 3023, 3024, 3025, p. 505. (3) The plaintiffs knew when they purchased the property in question from L. K. Flannagan & Co. that it had not been paid for, and therefore they are not entitled to hold the property as innocent purchasers, for value, without notice of the existence of the prior claim of the manufacturing company for the purchase money. On the contrary said property remained in plaintiffs'

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hands subject to the executions issued on the judgments for the purchase money. It results that the defendant's first instruction should have been given as asked, and plaintiffs' fifth instruction refused. R. S., sec. 2353, p. 393; *Parker v. Rodes,* 79 Mo. 88; *Milling Co. v. Turner*, 23 Mo. App. 103. (4) The court erred in giving instructions with respect to estoppel, because: (*a*) The testimony did not show that it was within the scope of the agency of Smith to make the alleged statements imputed to him by plaintiffs and upon which they rely as grounds for estoppel. *Fougue v. Burgess*, 71 Mo. 389. (*b*) And the letter from the plaintiffs, Hawk Brothers, dated September 7, 1886, five days after the alleged conversations with Smith, shows that they then knew that Smith had not effected a settlement with Flannagan & Co., and nothing whatever thereafter occurred on the part of Smith or the manufacturing company to induce plaintiffs to consummate their trade with Flannagan & Co. The David Bradley Manufacturing Company was guilty of no fraud or deception towards plaintiffs, and there is no estoppel in the case. *Bales v. Perry*, 51 Mo. 454; *Kingman v. Graham*, 51 Wis. 232; *Douglass v. Cissna*, 17 Mo. App. 44, 62–63; *Acton v. Dooley*, 74 Mo. 63.

Huston & Parrish, for the respondent.

(1) The lower court did not err in admitting in evidence the statements of F. H. Smith. Because these statements were made while the agent Smith "was transacting the business of his principal and was a part of such transactions." He came there to adjust and arrange the Flannagan debt, in response to a letter written by plaintiffs, and what he said and did, in and about that matter while so engaged, were and are the acts and statements of the principal. This is elementary law and sustained by the very cases cited by appellant. (2) The lower court did not err in directing the jury to disregard the so-called indemnifying bond because: (*a*)

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The evidence, without contradiction by defendant, showed that the makers of such bond were all non-residents of Putnam county, when such bond was executed. R. S., secs. 3023-4-5, p. 505; R. S., sec. 2366, p. 396; R. S., sec. 404, p. 64; R. S., sec. 2890, p. 485; R. S., secs. 465-6, p. 74. (*b*) The notice given by the claimants had fully accomplished its purpose and died when the constable released the property to them on the fifth day of March. The notice was given on the first day of March, the constable, in violation of law, held the property until the fifth, when it was released, and restored to the plaintiffs. This so-called bond of indemnity was not received or approved by the constable until the twelfth of March, and, after receiving it, he made a new levy, reseized the property. He received the bond and approved it when he did not have any property levied on, it had all been released seven days before. After the second levy no notice of claim was given. The former notice was dead and respondents had a perfect right to replevy the goods. R. S. 1879, secs. 3023-4-5, p. 505. (*c*) The policy, purpose and intention of the statute is simply to substitute a right of action against the bondsmen in lieu of that which the common law gave against the officer. It is simply intended as a transfer of responsibility, and should not be construed so as to make it an engine of oppression. See statute cited under "*a*." (3) The court did not err in giving plaintiffs' fifth instruction, nor in modifying defendant's first instruction: (*a*) Because neither the judgment nor execution ascertained, or adjudicated in any way, that they were for the purchase price of the goods levied upon. (*b*) Because the amount which was split up into all these small notes upon which judgment was rendered and executions issued was simply a general balance of account between Bradley & Co. and Flannagan & Co. (*c*) Because there was no proof made of the insolvency of Flannagan & Co. The statute is only a bar to exemption, does not create any lien,

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simply prevents the purchaser from holding it exempt. R. S., sec. 2353, p. 393. If the vendee be solvent the vendor has no right to compel payment of the purchase price by a third party. If "A" purchase a horse from "B" who is worth ten thousand dollars, with the knowledge that the horse is not paid for, could the original vendor, without making any attempt to collect of "B," or showing that such attempt would be unavailing, seize and sell the horse "A" had bought and paid for? If so, then the statute creates a lien. (*d*) Because the estoppel pleaded in the reply was well sustained by the testimony, and was properly submitted to the jury. *Pelkenton v. Ins. Co.*, 55 Mo. 172; *Taylor v. Saugrain*, 1 Mo. App. 313; *Austin v. Loring*, 63 Mo. 19; *Turner v. Baker*, 64 Mo. 218; *Guffy v. O'Reiley*, 88 Mo. 418.

SMITH, P. J.—This was an action of replevin, brought by the plaintiff against the defendant, in the circuit court of Putnam county, to recover certain specific personal property.

The petition was in the usual form. The answer admitted the possession, but denied the ownership of the property.

It further alleges two separate defenses, one was that the defendant being a constable, having in his hands a number of executions, in favor of the David Bradley Manufacturing Company, against L. K. Flannagan & Co., levied the same upon, and took possession of said personal property thereunder, and that thereupon the plaintiff gave him notice that they claimed said property, and that the defendant then demanded and received of the said manufacturing company a bond of indemnity, conditioned as required by statute, which facts were pleaded in bar of plaintiffs' action. And the other defense was that the said judgments, upon which the executions issued were for the unpaid purchase price of the said property of which the plaintiff had notice before their pretended purchase thereof.

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The replication contained a general denial, and the plea of estoppel, in that said manufacturing company had informed plaintiffs that it had no claim on said property, and had requested them to purchase the same from Flannagan & Co., and that relying upon such assurances and request, they made purchase thereof.

The evidence at the trial tended to show that Flannagan & Co. were doing a hardware and implement business at Unionville, at the same time plaintiffs were engaged in a similar business there. Flannagan & Co., in August, 1886, proposed to sell out to plaintiffs at a lumping price.

The parties entered into a written agreement to that effect. after which plaintiffs wrote to all the creditors of Flannagan of their proposed purchase, and requested them, if they had any claims against Flannagan & Co., to send the same to them or send some one to represent them, so that they might be provided for. In response to this the creditors came and their claims were all adjusted, except that of the Bradley Manufacturing Company.

They had a contract with Flannagan & Co., whereby the implements not sold in the season of 1886 should be carried over to the next season, and as the selling season for such goods was then over, Flannagan wanted to get the benefit of this time. The Bradley Company sent as their agent in the business one F. H. Smith, when he arrived there was a conversation between him and the plaintiffs herein. They told him of their arrangement to purchase. Smith then had an interview with Flannagan, in the course of which he settled with him and took a note, payable in a short time for the amount of the claim.

About that time he told plaintiffs to go ahead with the trade, that he had settled with Flannagan, and would look to him for the money. This was about September 5, 1886. They then went on with the purchase. Smith helping them take an inventory, and they paid Flannagan twenty-five hundred dollars and executed two notes for

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the balance, one for one thousand dollars and the other for fifteen hundred dollars, and took the goods. There was an arrangement made between Flannagan & Co., and Smith, by which the former was to pay the note given by them to the Bradley Company, and which was deposited in the bank for collection, out of the money he was to get out of the trade with plaintiffs.

Plaintiffs, before they paid their money or gave their notes, wrote Bradley & Co. a letter, inquiring on what terms they would enter into a new contract with them for the goods sold Flannagan, and what discount was allowed, etc., that they understood Smith had failed to make a settlement with him.

To this the reply was, that they had received no report from Smith yet, but had written him for immediate reply.

The testimony discloses that Flannagan did not pay Bradley & Co. all their claim out of the cash proceeds of the sale to plaintiffs.

In the spring of 1887, Smith again appeared in Unionville, and induced Flannagan, on surrender of the note for all the claim, to give, in lieu thereof, small notes within the jurisdiction of the justice, due at once, and on which suit was immediately brought, judgment obtained, and execution issued and levied on this property. The levy was made on the twenty-sixth of February; claim was made on the first of March.

The constable held the goods after he notified the Bradley Company of the claim five days; then not having received any word from them, he, on the fifth of March, released the goods from the levy and gave them up to plaintiffs, who held them until the twelfth of March. On that day, seven days after they were released, the constable received the bond and made a new levy, which on the return on some of the executions is dated the twelfth, and others the fourteenth day, and others the sixteenth day of March, 1887. After this second levy on the goods no claim was made, but

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this suit was commenced to replevy the goods. It appeared in evidence that none of the makers of such alleged bond resided in Putnam county, but were all residents of St. Louis county at that time.

A number of instructions were given and refused, which will be noticed further on.

The jury found for the plaintiff, and, after the usual unsuccessful motions, judgment was rendered and defendant prosecuted his appeal therefrom to this court.

I. The first of the defendant's three grounds of appeal, is that the circuit court erred in admitting, in evidence over his objections, the statements of F. H. Smith. In this ruling we perceive no error. Smith was the accredited agent of the David Bradley Manufacturing Company, who had been especially interested with the negotiation and transaction of the very business, to which his statements related, and which statements were made while conducting the same. The statements of Smith to which exception is taken were part of the very business in which he was engaged for his principal, and therefore admissible.

The rule is that the declarations of an agent are admissible in evidence against his principal when a part of the transaction he is engaged in for his principal at the time. *McDermott v. Railroad*, 87 Mo. 285; *Gilman v. Railroad*, 13 Allen, 444; Story on Agency, secs. 134–135.

The said manufacturing company were written to by plaintiffs before the consummation of the sale, and delivery of the goods by Flannagan & Co. to plaintiffs, that if they had any claims against Flannagan & Co., to send their representative there that some arrangement might be made with it for settlement of the same, and that Smith, representing said manufacturing company, appeared upon the scene, when the plaintiffs informed him that they were about purchasing the Flannagan & Co. stock of goods, and requested to know of him

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whether there was anything back on the same, they would like to arrange it with him, replied, "I will go and see Flannagan." After seeing Flannagan he returned and said, "We have settled with Flannagan for the goods, go ahead and buy them." There were, of course, a number of conversations between Smith and the plaintiffs during the various steps taken in respect to the negotiation of the sale of the goods, and the settlement of the claim with which Smith was entrusted, but they all relate to the one transaction of which they were a part, and must fall within the principle of the rule we have stated.

II. The defendant contends that the circuit court erred in instructing the jury for the plaintiff, that the taking of the bond of indemnity by him was no defense.

The defendant made the levy on the property, and took and approved the indemnity bond on the same day.

The plaintiffs instead of making claim thereto, as provided by section 3023, Revised Statutes, brought this suit. They had two concurrent rights, after the levy, one was to reclaim the property by an action of replevin, and the other was to give the notice provided by statute.

These were personal privileges—they could elect which remedy they would pursue. If they desired to regain possession of their property, they could do so by resort to replevin, on the other hand, if they did not so desire its possession, they could give the statutory notice, and if the indemnifying bond was given as required by said section 3020, let the property sell, and then sue on the bond to recover the damages they had sustained.

The manufacturing company could not deprive the plaintiffs of the right to exercise their choice of remedies, by giving to defendant a bond of indemnity, when there was no statutory claim made to the property after the levy. This right is conferred upon the party in possession of the property, and not upon him who is questioning his title and causing it, the property, to be

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seized under execution. The fact that the constable may know that the person in possession of the property levied on claims an ownership in it, for that (the law presumes) does not justify him in voluntarily demanding of the execution creditor a bond of indemnity, or, if so, the same would not have the effect to authorize the seizure and detention of the property of the plaintiffs, or to shield him from the legal consequences of the same in an action of this kind. What proceedings may have taken place, as to other and prior levies, was wholly immaterial in this case.

The instruction was proper enough.

III. The defendant complains that the circuit court further erred in giving the plaintiffs' fifth instruction, which told the jury that although the manufacturing company sold the goods in controversy to Flannagan & Co., who may not have paid therefor, and that the judgments upon which the executions were issued, under which the same were seized, were rendered for such unpaid purchase money, yet if, before plaintiffs completed their purchase, plaintiffs wrote to said company of their intention so to do, and requested it to send some one to represent it in reference to any claim it might have against Flannagan & Co., and that in response thereto it did send Smith as its agent for such purpose, and that he, on being informed of the intention of the plaintiff to purchase said goods, then informed them, or any of them, that his company had settled with Flannagan & Co. for such goods, and looked to him for payment, making no objection to the purchase, but assisting plaintiffs in making an inventory, and that plaintiffs thereafter, relying on such statements, completed the purchase of the goods and paid for them in cash and notes, the jury should find for the plaintiffs.

Instruction number one asked by the defendant, and refused by the court in effect, told the jury that even if they did find the facts hypothecated in the preceding instruction, they should find for the defendant, if they

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found further that the said judgments, on which the executions were issued and levied, were for the indebtedness for the purchase of said goods, and that the plaintiffs had knowledge of this before the purchase of said goods, and payment therefor, and that the said indebtedness had not been paid, for then the said levy and possession of defendant was lawful.

The court appended to this instruction the proviso "unless they further believed that the said manufacturing company, by its authorized agent, informed plaintiffs it had no claim upon the goods and induced plaintiffs to purchase them, upon the assurance it would look to Flannagan & Co. for its pay," and, thus amended, it was given. These two instructions by this modification of the court were brought into exact harmony, and as the estoppel was pleaded, and there was evidence adduced to support this theory, we cannot say this action of the court, in the giving of the one, or the refusing of the other, was erroneous.

We take it that while personal property under section 2353, Revised Statutes, is subject to execution on a judgment against the purchaser for the price thereof, except in the hands of an innocent purchaser for value, without notice of such prior claim, that where one who has notice of such prior claim desires to buy such property, and is informed by the execution creditor that arrangements have been made whereby he would look to the original purchaser and not to the property for such purchase money, and upon that the faith of such assurances, the property is bought and paid for, the buyer's position is not different from that of an innocent purchaser for value without notice—this is so upon principle.

Perceiving no error in the record prejudicial to the defendant, the judgment will be affirmed. All concur.

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NEW HAMPSHIRE CATTLE COMPANY, Respondent, v. JOHN S. BILBY, Appellant.

Kansas City Court of Appeals, May 20, 1889.

Chattel Mortgage: DESCRIPTION: PAROL EVIDENCE. **Plaintiff** 37 43
claimed the twenty-five head of cattle in controversy under a chat- 55 162
tel mortgage from one C. recorded in Nebraska, and describing the 37 43
mortgaged cattle as one hundred and nine head branded with 62 622
"(—) on left side and Z on both hips." Proof showed 37 43
eighteen of the twenty-five head to be branded with (—) on the 93 132
left side and the remaining seven with Z on both hips. ***Held,***

(1) The cattle in controversy did not come within the description of the mortgage.

(2) That mortgaged property must be correctly and truly described so as to not mislead; and such description must control.

(3) That while parol evidence may aid an imperfect description, it cannot contradict the description, nor affix a different one to the mortgage.

Appeal from the Nodaway Circuit Court.—HON. C. A. ANTHONY, Judge.

REVERSED.

Johnston & Craig, for the appellant.

(1) The court erred in admitting in evidence, over the objection of defendant, the copy of the alleged chattel mortgage purporting to have been executed on the twenty-second day of November, 1886, by Edmund Cooper. *Sheldon v. Merrell*, 13 W. Rep. 716; *Bissell v. Pearce*, 28 N. Y. 252; *DeReisthal v. Walton*, 8 At. Rep. 462; Jones Chat. Mort., sec. 274, p. 232; Greenl. on Ev. [14 Ed.] sec. 498, p. 593; *Childress v. Cutter*, 16 Mo. 24. (2) The court erred in giving instructions numbers 1, 2 and 3, asked by plaintiff, and in refusing to give instructions numbers 3 and 4, asked by defendant. Cases cited under first and fourth points

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and *Willis v. Stevens*, 24 Mo. App. 494, exact page 603; *Range Co. v. Alexe*, 28 Mo. App. 184; *Skyles v. Bollman*, 85 Mo. 35; *Bowen v. Railroad*, 75 Mo. 426; *Severance v. Leavitt*, 20 N. W. Rep. [Neb.] 273; Jones Chat. Mort., sec. 236 (latter part); *Bank v. Murdock*, 62 Mo. 70; *White v. Maxey*, 64 Mo. 552; *Smith v. Railroad*, 19 Mo. App. 120; *Batterson v. Vogel*, 10 Mo. App. 235, exact page 239. (3) The court erred in overruling defendant's motions for new trial and in arrest. See cases cited under first, second and fourth points. (4) The court erred in admitting said copy of the alleged mortgage, because the cattle described in said alleged mortgage are not, by description, the cattle sued for. *Adams v. Bank*, 5 N. W. Rep. 619; *Hutton v. Arnett*, 51 Ill. 198; Jones on Chat. Mort., sec. 62, p. 57, and sec. 64, p. 59; *Rowley v. Bartholomew*, 37 Iowa, 374; *Ruby v. Coal & Mininy Co.*, 21 Mo. App. 159; 2 Phillips on Evidence, 633.

S. R. Beach, for the respondent.

(1) Appellant insists that the court erred in admitting the copy of the chattel mortgage, executed by Cooper to respondent, in evidence; because it was not authenticated under the "act of congress"—which we deny, and say that the validity of the instrument was a question for the court, to be passed upon by it, before it could be read to the jury. Jones Chat. Mort., sec. 301; *Bailey v. Godfrey*, 5 Am. Rep. 161; *Kanaga v. Taylor*, 70 Am. Dec. (note 6) p. 72; Story Conflict of Laws [7 Ed.] sec. 638. And so was the question of its admissibility as evidence to the jury for the court. It was a valid mortgage, under the laws of Nebraska, where made (Compiled Stat. of Neb. of 1885, secs. 14 and 16, chap. 32, page 365), and was, therefore, good everywhere; Jones, Chat. Mort., secs. 299, 301, 303, 621; *Kanaga v. Taylor*, 70 Am. Dec. 62; *Roach v. Type Foundry*, 21 Mo. App. 118; *Smith v. Hutchings*, 30 Mo. 383; *Feurt v. Rowell*,

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62 Mo. 524. (2) No error exists in instructions for respondent, for which appellant can complain. If our instruction number 1 required us by proof to trace the cattle through the hands of commission men at Kansas City, which was unnecessary and not material for us to do to maintain the issue that would not mislead the jury or injure appellant, but would only impose an additional burden upon respondent, for which appellant could not complain. *Jackson v. Ins. Co.*, 27 Mo. App. 63; *Keen v. Schnedler*, 92 Mo. 516; *Johnson v. Railroad*, 22 Mo. App. 597, 600; *Radcliffe v. Railroad*, 90 Mo. 128. (3) The court did not err in refusing a new trial. The verdict was not against the evidence nor the weight of the evidence. Appellant says that the cattle described in our mortgage, must all have two brands (sardine box, and bar-Z-bar) upon them; that the evidence showed that no animal, by us found in his possesion, had both, yet every such animal had one or the other of said brands, and therefore he argues that we did not identify the cattle, and that the jury could not find for us. We answer that in this suit (trover), we are not after the cattle (as in replevin), but are after their value, and the description is not so material, and is quite good enough. Wells, Replevin, sec. 172. Jones, Chat. Mort., secs. 53, 54; 40 Mich. 705.

GILL, J.—The plaintiff recovered judgment in the circuit court, against defendant Bilby, in the sum of $928.95, for an alleged conversion of twenty-five head of cattle, and defendant has appealed to this court. One Edmund Cooper, of Cass county, Nebraska, owned and held the cattle where he resided, from November, 1886, to sometime in January, 1887, when he consigned them to the Kansas City stock yards, and they were there sold to defendant Bilby, and he had them on his farm in Nodaway county, Missouri, when and where plaintiff demanded said cattle, and, being refused, brought this action for their value.

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Plaintiff claims under a certain chattel mortgage executed by Cooper, the former owner, in November, 1886, and filed for record immediately thereafter in Cass county, Nebraska, where he, Cooper, then resided. Said mortgage was made to secure a note of that date, given for the purchase price of some one hundred and nine head of cattle. The cattle in the mortgage under which plaintiff claims are thus described: "One hundred and nine (109) head of three-year old steers, branded, viz.: (═) on left side, and Z on both hips." The twenty-five cattle which plaintiff found in the possession of defendant Bilby, at his farm in Nodaway county, and for the conversion of which this suit is brought, were branded as follows: Eighteen were branded with the "sardine box," so-called, (═) on the left side, and the remaining seven with the *Z* brand on both hips, but none of the twenty-five head had the sardine box brand (═) on left side *and* the Z brand on the hips.

The foregoing comprise all of the facts, which for the purpose of our decision are necessary to be here stated.

A number of questions are presented in briefs of counsel, but it seems there is one insuperable obstacle, presented on the face of this record, to the right of recovery in the plaintiff. The chattel mortgage, upon which plaintiff relies, did not impart notice to the defendant of plaintiff's rights, if any he had, to the cattle in controversy.

The description in the mortgage covered the three-year old steers branded with *both* the "sardine-box" brand on the left side, *and* the Z brand on the two hips.

A steer branded simply with the "sardine box" on the left side, and *not* with the Z brand on the two hips, did not fill that description. It is true that parol evidence may be called in to explain the circumstances, and thereby fit the description, *as given in the mortgage*, to certain property intended to be mortgaged, but

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it is not permitted the mortgagee to show, as against an innocent purchaser, that his mortgage, describing the property of a certain description, covered, or applied to, property of a different description. The law imposed on Bilby constructive notice of this record up in Nebraska, and when he bought these cattle at Kansas City he was supposed to know that Cooper had mortgaged to the New Hampshire Cattle Company one hundred and nine head of three-year old steers, all branded with (—) on the left side, *and* the Z on both hips. The cattle in controversy, and purchased by him, he could well say, did not come within that description. "A mortgagee of personal property must see to it that the property mortgaged is correctly and truly described, so that others may not be misled. The description in the mortgage must control, otherwise great fraud and injury might result." *Hutton v. Arnett*, 51 Ill. 198. See also *Rowley v. Bartholomew*, 37 Iowa, 374; *Adams v. Bank et al.*, 5 N. W. Rep. 705; Jones on Chat. Mort., secs. 54, 55, etc.; *Stonebraker v. Ford*, 81 Mo. 532.

Parol evidence may be called in to *aid* an imperfect description, but not to contradict, or affix to the mortgage one different from that therein contained. See authorities *supra*.

It is unnecessary to further discuss the various points raised in this cause. Since this mortgage gave plaintiff no rights in these cattle as against defendant Bilby, the judgment below should have been for the defendant. Judgment reversed. The other judges concur.

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MARIA P. SHERWOOD *et al.*, Appellants, v. SANFORD J. MILLER, Respondent.

Kansas City Court of Appeals, May 20, 1889.

Judgment: WHAT IS NOT: STATUTE SO MAKING IT. An alleged judgment set out in the opinion, and declared on in the petition as valid under the statute of Pennsylvania, is examined and *held* not to be a judgment unless it be made so by statute law of that state, and as to what that law is neither this court nor the trial court had any means of knowing, as it was not offered in evidence, nor can it be assumed, had the judgment been admitted, it would have been followed by the offer of the statute.

Appeal from the Adair Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

Blair & Marchand, for the appellants.

(1) Exhibit "A" as a judgment is an anomaly under our Missouri practice, but as each state regulates its own practice and the manner and mode of confessing, rendering and entering judgments we must look to the law of Pennsylvania. The law is set out in plaintiffs' petition. Had the record been allowed to be read we then would have introduced the law of Pennsylvania, authorizing judgment by confession and entry thereof, as is done in the record. *Haines v. Green*, 19 Mo. 323; *Matthews v. Parker*, 27 Miss. 642. (2) If the law of Pennsylvania required the prothonotary to render judgment upon such confessions, then there would be some grounds for holding the facts stated in the abstract not sufficient to constitute a judgment, but the law is otherwise, as will be seen in our petition the party confesses the judgment in writing. The judgment creditor then hands the judgment thus confessed to the prothonotary, and then he "enters," not "renders," the judgment

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already confessed *in pais* in his docket; and also enters therein the instrument upon which said judgment is confessed. (3) Conceding the record defective as a judgment, the judgment having been admitted by debtor in his answer, the same should have been received in evidence over the objections of defendant. (4) The record was properly exemplified. Laws U. S. 1 Stat. 1879, secs. 905, 906, p. 696; *Omahundro v. Clarkson*, 13 Mo. App. 582; *Taylor v. Heitz*, 87 Mo. 660. (5) It is a universal rule that, where a contract is made, the laws of that country or state enter into and form a part of the contract. As to whether the judgment was revived in the names of the plaintiffs according to the laws of Pennsylvania, was a fact to be proven like any other fact. But we were prevented from making proof thereof by the premature ruling of the court. Freeman on Judgments, sections 564-69-88; *Deisers, Adm'r, v. Sterling et al.*, 10 Sergeant & Rawle, 119; *Gemmill v. Butler*, and authorities cited, 4 Barr. 232; *Oglesby v. Lee*, 7 Watts & Sergeant; Act, 1834, sec. 26, Leg. of Pennsylvania; Perdon's Digest, page 98, and notes; also 3 Map. 514, 54 Pa. 408; 4 Cent. Law Rep. 287 (6) The entry of judgment, though defective and informal, will be sustained. Substance is all that is required. Freem. on Judg., secs. 47, 48, 50*b*; *Fuller v. Keller*, 48 Mo. 542; *Bates v. Delavan*, 5 Paige [N. Y.] 299; *Davis v. Shaver*, Phill. [N. C.] L. 18; *Barrett v. Garrigan*, 16 Io. 47; *Ordinary v. McClure*, 1 Baily [S. C.] 7; *Harland v. Eastman*, Hand. [Ky.] 590; *Gibson v. Foster*, 2 La. Ann. 503; *Cromwell v. Bank*, 2 Wall. 560; *Aldrich v. Mitland*, 4 Mich. 205; *Fullerton v. Killerher*, 48 Mo. 542; *Maxwell v. Stewart*, 22 Wall. [U. S.] 77; *Terry v. Berry*, 13 Nev. 514; *Elliot v. Jordan*, 7 Bax. [Tenn.] 376; *Marsh v. Snyder*, 14 Neb. 8; *Humman v. Lewis*, 34 Tex. 474; *Gutzwider v. Crow*, 32 Minn. 70.

P. F. Greenwood, for the respondent.

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(1) The petition shows on its face that the suit is prosecuted by plaintiffs as administrators, appointed as such in a foreign jurisdiction, while they style the suit Maria P. Sherwood and John L. Sherwood, plaintiffs. Yet they allege in the petition their appointment as such administrators by the register for the probate of wills of Wayne county, Pennsylvania, and the petition on its face shows no interest in them excepting such as they have by virtue of their administratorship, and in reply they admit the debt was due and owing them as administrators. *Naylor's Adm'r v. Moffat*, 29 Mo. 126; *Partnership Estate of Henry Ames & Co.*, 52 Mo. 290; *Morton v. Hatch*, 54 Mo. 408; *May v. Burk*, 80 Mo. 675. (2) The caption of the petition is immaterial, in determining the character in which plaintiffs sue. The allegations in the body of the petition must control. *Fuggle v. Hobbs*, 42 Mo. 537; *State to the use etc. v. Matson*, 38 Mo. 489; *Buckley v. Iron Co.*, 77 Mo. 105; *State ex rel. v. Dodson*, 63 Mo. 451. (3) If plaintiffs have in their petitions stated a cause of action in their representative capacity, then no recovery can be had on any individual interest they may have. *Burdyne v. Mackay*, 7 Mo. 374. (4) It is alleged in the petition that the note was executed November 17, 1880, due four years after date; that on January 14, 1881, the prothonotary of Wayne county did enter a judgment in favor of said Munson Sherwood and against said defendant for the sum of $1000.00 to draw interest from the twenty-seventh day of November, 1880. The note was due on January 14, 1881. It was not brought in to be cancelled, but for obtaining a judgment bottomed on it. *Steamboat v. Lumm, etc.*, 9 Mo. 64; *Turk v. Stahl*, 53 Mo. 437; *McCoy v. Farmer*, 65 Mo. 244 and 249. (5) The laws of a sister state are facts, which must be pleaded and proved as such. *Flato v. Marshall*, 72 Mo. 522; *Sloan v. Torry*, 78 Mo. 623; *Morrissey v. Ferry Company*, 47 Mo. 521; *Houghtaling v. Ball*, 19 Mo. 84; *Myer v. McCabe*, 73

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Mo. 236; *Long v. Long*, 79 Mo. 651; *Charloth v. Chouteau*, 25 Mo. 473. (6) Is the paper called exhibit "A" a judgment? A negative answer affirms this case. The paper submitted to the court as exhibit "A" has not the first characteristic of a final judgment. In practice it is true perhaps that the same amount of care is not taken now in preparing the judgment roll as in former times at the trial. But when it becomes necessary to sue on a judgment then the record must be drawn up in full and the ancient formalities must be observed at least in a measure. Bouv. Law Dict. [12 Ed.] p. 763, subdiv. 12 under head "judgments." This exhibit could have no greater force by reason of being rendered in Pennsylvania than if it had been rendered here as a domestic judgment. *Marx v. Fore*, 51 Mo. 69, bot. p. 73, top p. 74. (7) If it were possible to call this a judgment how stands the pretended revival or substitution in name of plaintiffs in this judgment so-called? To revive a judgment, see statute of Mo. 1879, secs. 2732 to 2743 inclusive. (8) It is a cardinal principle that whenever a party's rights are to be affected by a summary proceeding or motion in court that party should be notified in order that he may appear for his own protection. *George v. Middough*, 62 Mo. 549. (9) The order of trial is discretionary with the court. *State v. Linney*, 52 Mo. 40; *Cross v. Williams*, 72 Mo. 577. (10) As appellants say "this exhibit is an anomaly." They should have introduced the law in evidence which made their "anomaly" a judgment, if any such law they had, and by failing to introduce in evidence any such law, their "anomaly" was properly excluded. *Hofheimer et al v. Losen*, 24 Mo. App. 652. (11) The only presumption which can be indulged by our courts would be to presume the common law now in force in Pennsylvania, in the absence of any proof of the statutory law. Tested, then, by the common law, this exhibit is not a judgment. *Meyer v. McCabe*, 73 Mo. 236; *Warren v. Turk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84; *Long v. Long*, 79 Mo. 651.

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ELLISON, J.—This action is on a judgment alleged to have been rendered against the defendant in the state of Pennsylvania. The petition declares upon the judgment as being valid under the statute of the state, which is pleaded. The judgment, the entries thereon and certificates thereof are filed with the petition as exhibit "A." The trial was had without the intervention of a jury, and plaintiffs, for the purpose of sustaining the issues on their part, began by offering in evidence said exhibit "A," which is as follows:

"EXHIBIT A.

"Among the records and proceedings enrolled in the court of common pleas in and for the county of Wayne, in the commonwealth of Pennsylvania, to number 131, February term, 1881, is contained the following:

'COPY OF CONTINUANCE DOCKET.

'Munson Sherwood
vs. } 'No. 131.
'S. J. Miller.

'Amicable action.—Debt on note. January 14, 1881, plaintiff files note drawn Nov. 27, 1880, for one thousand dollars, payable four years after date, confessing judgment for same, interest and costs and waiving inquisition and exemption. Interest payable annually.

'Judgment, $1000.00.
'Interest Nov. 27, 1880.

'Dec. 24, 1884.—The death of Munson Sherwood suggested and Maria P. Sherwood and J. L. Sherwood, administrators, substituted as plaintiffs. All interest paid to Nov. 27, 1883.

'GEO. G. WALLER,
'Pl'ffs' Att'y.'

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'JUDGMENT DOCKET ENTRY.

DEFENDANTS.	PLAINTIFFS.	NO.	TERM.	YEAR.
Miller, S. J.	Munson Sherwood	131	February	1881

NATURE.	WHEN ENTERED.	INTEREST FROM	AMOUNT.
Note	January 14, 1881	November 27, 1880.	$1000.00

'COPY OF NOTE.

'$1000.00. EQUINUNK, PA., Nov. 27, 1880.

'Four years (interest annually) after date, for value received, I promise to pay Munson Sherwood, or bearer, one thousand and $\frac{00}{100}$ dollars, with interest from date, without defalcation or stay of execution; and hereby confess judgment for the above sum, interest and costs, and authorize any prothonotary of any court of common pleas in Pennsylvania to enter judgment hereon, waiving the right of inquisition and property exemption, under the laws of this commonwealth, both in regard to property I now own or may hereafter own, and I agree that any property owned by me may be sold on any execution issued upon the judgment entered hereon.

'Witness my hand and seal the day and year aforesaid.

'S. J. MILLER, [seal.]'

'ENDORSED.

'No. 131, Feb'y T., 1881.

'Munson Sherwood *vs.* S. J. Miller.

'Note

'Filed, Jan'y 14, 1881.

'Enter judgment on the within note.

'WALLER & BENTLEY,

'Att'ys for Pl'ff.

'To C. Menner, Proth'y, Pl'ff, pd. $1.25.

'Commonwealth of Pennsylvania, } ss.
'County of Wayne. }

'I, W. A. Gaylord, prothonotary of the court of common pleas in and for said county, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein Munson Sherwood, plaintiff, and S. J. Miller, defendant, as the same remains of record before the said court at number 131 of Feb'y term, A. D. 1881.

'In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this twenty-fourth day of December, A. D. 1884.

'(seal) W. A. Gaylord,
'Prothonotary.'

'I, Henry M. Seely, presiding judge of the Twenty-second Judicial District, composed of the counties of Wayne and Pike, do certify that W. A. Gaylord, by whom the annexed record, certificate and attestation were made and given, and who in his own proper handwriting thereunto subscribed his name and affixed the seal of the court of common pleas of said county, was at the time of so doing, and now is, prothonotary in and for said county of Wayne, in the commonwealth of Pennsylvania, duly commissioned and qualified, to all of whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that the said record, certificate and attestation are in due form of law, and made by the proper officer, Dec. 24, 1884.

'H. M. Seely, Presiding Judge.'

'Commonwealth of Pennsylvania, } ss.
'County of Wayne. }

'I, W. A. Gaylord, prothonotary of the court of common pleas in and for the said county, do certify

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that the Honorable Henry M. Seely, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, presiding judge of the court of common pleas, orphans' court and quarter sessions of the peace, in and for said county, duly commissioned and qualified; to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

'In testimony whereof I have hereunto set my hand and affixed the seal of said court, this twenty-fourth day of December, A. D. 1884.

'[seal.] W. A. Gaylord,
'Prothonotary'."

Defendant objected to such evidence for the reason, among others, that it was not a judgment. The objection was sustained. Whereupon plaintiffs took a nonsuit with leave to move to set it aside. After an unsuccessful motion they appeal to this court.

The paper offered in evidence purporting to be a judgment is not a judgment unless it be made so by the statute law of Pennsylvania, and as to what that law may be, we have no means of knowing, nor had the trial court, as it was not offered in evidence. Counsel, recognizing this proof as necessary to the success of his case, states that if the judgment had been admitted, the statute of Pennsylvania would have then been introduced. But this will not suffice; there was no offer of the statute and we cannot say what may or may not have been done. The point is insisted upon by the defendant and we are not at liberty to pass it by. The judgment will therefore be affirmed. All concur.

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LEWIS SMOCK, Respondent, v. MATHIAS SMOCK, Appellant.

37 56 / 55 640
37 56 / 57 275
37 56 / 68 668
37 56 / 72 563
37 56 / 91 569
37 56 / 93 *191 / 93 1635

1. **Statute of Frauds:** CHATTEL PERSONAL V. CHATTEL REAL: FRUCTUS INDUSTRIALES V. FRUCTUS NATURALES. It seems quite well established, both in England and this country, that annual crops—crops raised by yearly cultivation or *fructus industriales*, are to be regarded as personal chattels, independent of and distinct from the land, and capable of being sold, by oral contract and without regard to whether the crops are growing or have matured—have ceased to draw nutriment from the soil. And apples, peaches and blackberries, which require the manurance and industry of man for their annual production, should be classed as *fructus industriales*, and so, as a chattel personal. Therefore a contract to give "one-half, in the orchard, of all apples and peaches, and one-half of all the blackberries on the bushes, which might be raised or produced by said orchard and blackberry bushes, situated on a certain tract of land of defendant during the years 1886–1887 and 1888," is not within the statute of frauds, and need not be in writing.

2. ——— : CONTRACT NOT TO BE PERFORMED WITHIN ONE YEAR: COMPLETE PERFORMANCE. The above contract would, however, fall within the statute, because it was not to be performed within one year, but for the fact that plaintiff had fully performed the contract on his part.

3. **Definitions:** GIVE. The word, "give," as used in the above contract, means to yield possession of, to deliver over as property in exchange.

4. **Contract:** CONSTRUCTION OF: DELIVERY. A fair construction of the contract in this case is, that defendant was to deliver said products at the proper season of the year for gathering apples, peaches and berries, at the place where grown.

5. **Damages:** MEASURE OF. The measure of damages for the breach of said contract is the value of one-half of the product at the time the same was fit for delivery.

6. **Instructions:** REVERSAL. An instruction inaccurate in expression, but not misleading or prejudicing, should not reverse.

7. **Definitions.** Chattel real, chattel personal, *fructus naturales* and *fructus industriales* are defined and discussed.

Appeal from the Nodaway Circuit Court.—HON. C. A. ANTHONY, Judge.

AFFIRMED.

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Johnston & Craig, for the appellant.

(1) The court erred in refusing instruction number 1, asked by the defendant. (*a*) Plaintiff in trover, through a verbal contract made in 1885, claims right of property in the fruit on the trees grown in 1887 on defendant's orchard. This fruit being *fructus naturalis* the contract was for the conveyance of an interest in land, and to have been effectual must have been in writing and under seal. R. S. Mo., sec. 674; *Deland v. Vanstone*, 26 Mo. App. 297; *Andrews v. Costican*, 30 Mo. App. 29. (*b*) The evidence did not sustain the case made by the petition. There was a fatal variance between the allegations of the petition and the evidence, in this: By the petition it became necessary for plaintiff to prove that the plaintiff was to take one-half the fruit, if entitled to it at all, from the trees, and to demand of defendant such fruit on the trees to which plaintiff was entitled, while the plaintiff himself testified that he did not demand one-half the fruit. (P. 19 of record.) He also testifies in his examination in chief (found on p. 18 of record), as follows: "On September 15, 1887, I went to commence delivering apples and defendant forbid me. I never got any of the money for the apples. He kept all the fruit and never gave me any money proceeds of the sale for 1887. He refused to do so." And besides, under the issues in the case, it was absolutely indispensable that plaintiff establish his right to recover by written evidence, acknowledged and under seal as the case made was within Revised Statutes, 1879, section 2513, and Revised Statutes, section 674. There being no competent evidence to establish in plaintiff a right of recovery, instruction number 1 asked by plaintiff should not have been given. *Lee v. David*, 11 Mo. 114; *Harris v. Woody*, 9 Mo. 113; Thompson on Charging the Jury, p. 44, secs. 1-2 and authorities. (2) The court erred in giving instruction number 1, asked by plaintiff. (*a*) If, according to plaintiff's

theory, the plaintiff had performed his contract in full, and had nothing to do but to receive the fruit, which defendant was to deliver to him ready for market, yet (1) said contract was not to be performed within a year, and (2) being for an interest in real estate was within the statute of fraud, for both reasons, and plaintiff was not, under the pleading and evidence, entitled to the value of one-half the fruit grown during the year 1887. The contract was made October 30, 1885. *Sharp v. Rhiel*, 55 Mo. 97; *Atwood, Adm'r, v. Fox*. 30 Mo. 499; *Deland v. Vanstone*, 26 Mo. App. 297–302; *Andrews v. Costican*, 30 Mo. App. 29; *Briar v. Robertson*, 19 Mo. App. 66; *McIlvaine v. Harris*, 20 Mo. 457; Tiedeman on Real Property, sec. 799, pp. 800 and 801; 3 Washburn on Real Property [5 Ed.] p. 368. (2) 1 Benj. on Sales [4 Am. Ed. by Corbin] note 5, pp. 136, 137, 138 and 139; Bish. Cont. [Enlarged Ed.] sec. 1297; *Green v. Armstrong*, 1 Denio, 551; *Owens v. Lewis*, 46 Ind. 488; *Kingsley v. Hollsbrook*, 45 N. H. 313; s. c., 86 Am. Dec. 173; *Patterson's Appeal*, 61 Penn. Stat. 294; s. c., 100 Am. Dec. 637. *Slocum v. Seymore*, 36 N. J. [7 Vroom] 138; *Lillie v. Dunbar*, 62 Wis. 198. (*b*) Said instruction was erroneous in defining plaintiff's measure of damages. If plaintiff was entitled to recover at all, under the case made, the value of the fruit was not his measure of damages. *Fructus naturalis* is real estate, and a parol agreement to sell such, although the purchaser may pay the contract price, yet if the vendor refuses to consummate the sale, such payment is not such part performance as will take the case out of the statute, and the purchaser's only remedy is to recover back what he paid, if money, or the value of the service or other thing rendered in payment; and not the thing purchased nor its value, because that would be a plain evasion and nullification of the statute. *Barickman v. Kingkendall*, 6 Black Ind. 21; *Gaar v. Lockridge*, 9 Ind. 92; *Allen v. Booker*, 19 Am. Dec. 33; s. c., 2 Stew. Ala. 21; *Lockwood v. Barnes*, 3 Hill [N. Y.] 128; *King v. Brown*,

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2 Hill [N. Y.] 485; *Deland v. Vanstone*, 26 Mo. App. 297–302; *Andrews v. Costican*, 30 Mo. App. 29; *Jarboc v. Leverin*, 85 Ind. 498; *Green v. Groves*, 7 W. Rep. [Co-op. Ed.] 915; *Wallace v. Long*, 55 Am. Rep. 222; s. c., 105 Ind. 522; *Owens v. Lewis*, 46 Ind. 501; *Giles v. Simmonds*, 77 Am. Dec. 373; s. c., 15 Gray, 441; *Burton v. Scherpf*, 1 Allen, 135; *Harrell v. Miller*, 72 Am. Dec. 154; s. c., 35 Miss. 700. (*c*) Said instruction was erroneous in this: That it ignored the fact that while the proof unquestionably established the fact that according to the provisions of said contract, its terms could not be performed within a year, and that the very part of the same, for the non-performance of which this suit is brought, could not be performed until the lapse of about two years from the making of such contract, yet, notwithstanding the statute of frauds (R. S. 1879, sec. 2513), this instruction tells the jury that plaintiff was entitled under his contract to recover exactly the same as though it had been in writing, in compliance with said statute. *Lockwood v. Barnes*, 3 Hill [N. Y.] 128; *Atwood v. Fox*, 30 Mo. 499; *Sharp v. Rhiel*, 55 Mo. 97. (*d*) Said instruction was erroneous in this: That it tells the jury, if the plaintiff had nothing further to do under the contract, except to demand and receive said fruit of defendant, then such contract would be valid and binding on defendant, because performed by plaintiff. *Green v. Groves*, *supra; Carlisle v. Brannan*, 67 Ind. 12. (3) This was an action of trover; and before plaintiff could maintain trover he must show a general or special interest in the property converted; such property in the thing as would enable him to sustain replevin for the same had the defendant had possession at the time this suit was brought. Wait's Acts & Def., p. 121, secs. 1, 2, 6, 7; 2 Greenl. Ev., secs. 636, 637; 1 Chit. Plead., pp. 149, 160. If, according to plaintiff's theory, the defendant was to gather the fruit and deliver one-half of it to plaintiff, then, the same being *fructus naturalis* could not become the plaintiff's property

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until delivery; for if it be considered that plaintiff purchased the fruit after maturity as a chattel, then no title or interest could pass to or vest in him until by the contract it was matured and delivered. The contract was executory until his part of the fruit became ascertained, and distinguishable from the balance. This being the effect of the contract, defendant had a right to stand on the legal protection of the statute, deny plaintiff's right to the fruit, leaving plaintiff to his remedy to recover back what he had paid, etc. See authorities, *supra*. The error of the court in refusing instruction 5, asked by defendant, is presented above.

William Ellison, for the respondent.

(1) Did the plaintiff perform every part of the contract on his part, leaving nothing to be done by him but to receive the fruit from defendant, at the latter's home? If so, the doctrine of full performance applies, and the plaintiff is entitled to recover, unless the contract related to an interest in real estate. How can defendant interpose the statute of frauds, when the plaintiff had performed it completely on his part, leaving nothing to be done by him except to receive the fruit? The bond for a deed and the fifteen-hundred-dollar note, running for twenty years, had been cancelled; the deeds and deed of trust and three notes, maturing at different times, had been executed in lieu thereof. Every part of the contract on plaintiff's side had been fully and fairly performed. *Self v. Cordell*, 45 Mo. 345; *Suggett's Adm'r v. Cason's Adm'r*, 26 Mo. 221; *McConnell v. Brayner*, 63 Mo. 461; *Winters v. Cherry*, 78 Mo. 344; *Hoyle v. Bush*, 14 Mo. App. 408; *Tatum v. Brooker*, 51 Mo. 148; *Galley v. Galley*, 14 Neb. 124. (2) As to the measure of damages in a case like this, the rule is well put in *Suggett v. Cason*, 26 Mo. 221. (3) Appellant's claim is that (*a*) the agreement undertook to pass to appellee an interest in the

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fruit while yet on the tree; that (*b*) ripe fruit on the tree is a chattel real; and that, (*c*) therefore, the contract is void under the section of the statute of frauds in relation to the sale of real estate. Admitting the premises, such conclusions would undoubtedly follow. Appellee questions the correctness of both of these premises. That ungathered corn, potatoes, wheat or vegetables of all kinds, whether mature or immature, are regarded as personal property, is too familiar a proposition to require the citation of authorities. The contrary is intimated in *McIlvaine v. Harris*, 20 Mo. 457, a singular opinion in respect to this point, being opposed to all authority. It is directly overruled in the case of *Garth v. Caldwell*, 72 Mo. 622, at page 627. The question is: Should ungathered ripe fruit be classed under the same head? If so, the statute of frauds in relation to the sale of an interest in real estate has no application. Wood Stat. Frauds, sec. 201. That fruit on the tree is regarded as personal property, which may be sold by a verbal contract, has been decided in the following cases: *Purner v. Piercy*, 40 Md. 212; *Vulicerich v. Skinner*, 19 Pac. Rep. (S. C. Cal.) 424; Wood Stat. Frauds, p. 354; note, col. 2. While the license to enter may be revoked, such revocation does not prevent a suit for the breach of contract. *Hill v. Hill*, 113 Mass. 103; *Giles v. Simmonds*, 15 Gray, 441; Wood Stat. Frauds, secs. 196, 194, 195. The sale of growing hops (why not fruit?) was held to be not within the fourth section of the statute of frauds in the case of *Frank v. Harrington*, 36 Barb. [N. Y.] 415. And it is held that a contract for the sale of hop roots in the ground is not within the fourth section, though the hop roots are perennial. *Webster v. Zielly*, 52 Barb. [N. Y.] 482; *Wiley v. Bradley*, 60 Ind. 62; 3 Pars. Cont. [6 Ed.] 31, 32; 2 Whart. Ev., sec. 866; *Waters v. McGuigan*, 39 N. W. Rep. [Wis.] 382; 2 Whart. Ev., sec. 1249 and note.

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SMITH, P. J.—This is an action commenced by the plaintiff against defendant, in the circuit court of Nodaway county, to recover damages arising out of the breach of a contract.

The petition stated that the plaintiff had given to defendant his note for fifteen hundred dollars, due twenty years after date, in consideration of which defendant had executed to plaintiff a title bond conditioned, that on the payment of the note, that defendant would convey to plaintiff a certain tract of land; that defendant put plaintiff in possession of the land, and, while so in possession, that defendant proposed to plaintiff that if he would consent to the cancellation of said note, and title bond, and give him three notes for said note of fifteen hundred dollars, one for two hundred dollars, due on or before two years after date, a second for three hundred dollars, due seven years after date, and a third for one thousand dollars, due eighteen years after date, and secured by a deed of trust on said lands, conditioned, if the plaintiff failed to pay said notes, or the interest thereon annually, that the trustee, therein to be named, should be authorized to sell said real estate, etc., in consideration of which the defendant promised plaintiff a warranty deed conveying to him said land, and "one-half, in the orchard, of all the apples and peaches, and one-half of all the blackberries on the bushes, which might be raised or produced by said orchard, and blackberry bushes situated on certain tract of land of defendant during the years 1886, 1887, and 1888; that the note and bond for the deed were duly cancelled, and the three last-named notes and deed, and trust deed, were duly executed according to said agreement, that the said apple and peach orchard, and blackberry bushes, in the season of 1887, yielded and produced three thousand bushels of apples, of the value of thirteen hundred and fifty dollars, in the orchard, and fifteen bushels of peaches, of the value of $22.50, in the

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orchard, and thirty gallons of blackberries, of the value of nine dollars, on the bushes; that in proper time plaintiff demanded of defendant, one-half of said fruit, which defendant refused to let him have, one-half being of the value of $690.50," etc.

The answer contained a general denial, and the plea of the statute of frauds, as a defense.

There was a trial of these issues, and under the evidence and instructions the jury found for the plaintiff.

It is not deemed necessary to set forth at length, either the evidence or the instructions, the reference made to them hereafter being sufficient for the purpose of understanding, and determining the questions, which are presented by the record for our consideration.

The question is whether, an action brought against defendant to charge him on said agreement whereby he "promised plaintiff one-half in the orchard of all the apples and peaches, and one-half of all the blackberries on the bushes, which might be raised or produced by said orchard and blackberry bushes, during the years 1886, 1887 and 1888," is interdicted by the provision of the statute of frauds, which provides that no action shall be brought "upon any contract for the sale of lands, tenements, hereditaments, or an interest in or concerning them or any lease thereof for a longer time than one year, or upon any agreement that is not to be performed within a year from the making thereof, unless the agreement upon which the action shall be brought or some memorandum thereof shall be in writing and signed by the party to be charged therewith."

If the fruit "to be raised or produced by the orchard during" the last three years mentioned is a chattel real, the contract is within, and if it is a chattel personal, it is without, the statute, and whether it is the one thing or the other, depends upon what the contract itself is construed to mean.

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If the subject of the contract is comprehended in that class of products which are obtained by the labor and cultivation of man, and which the law has termed *fructus industriales* (Bouvier's Law Dict. 696; *Purner v. Piercy*, 40 Md. 212), then the contract itself is not governed by the statute of frauds, in so far that it need not be in writing. 2 Schouler's Pers. Prop. 468 *et seq.*; *Vulicerich v. Skinner*, 19 Pac. Rep. 424; *Marshall v. Ferguson*, 23 Cal. 65; *Davis v. McFarland*, 37 Cal. 636; Benj. on Sales, secs. 120, 121, 126.

Judge SHERWOOD speaking for the whole court in *Garth v. Caldwell*, 72 Mo. 622 said, "it seems quite well established now both in England and in this country, that annual crops, crops raised by yearly labor and cultivation or *fructus industriales*, are to be regarded as personal chattels, independent of and distinct from the land, capable of being sold, by oral contract and without regard to whether the crops are growing or having matured, have ceased to draw nutriment from the soil." But it is contended by the learned counsel for the defendant, that the subject-matter of the said contract belongs to that class of products, which are produced by the powers of nature alone, and which in law language are denominated *fructus naturales* (Bouvier Law Dict. 696), and therefore the contract is governed by the statute of frauds.

A growing crop of fruit requiring periodical expense, industry and attention in its yield, and production, may well be classed as *fructus industrialis*. *Purner v. Piercy*, 40 Md. 223; *Webster v. Zeilley*, 52 Barb. 482; Brown Stat. Frauds, secs. 236-237-246-247-249; *Evans v. Roberts* 5 B. & C. 829; 1 Greenl. Ev., sec. 371; Wood Stat. Frauds, sec. 203.

The circumstance that the produce may derive nutriment from the earth at the time of growing is not conclusive as to the statute, no intent of parties to buy or to sell the soil existing. Wood Stat. Frauds, sec. 205; *Purner v. Piercy*, *supra*.

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But this doctrine does not go far enough to comprehend fruit, that is to be produced in an orchard during three years subsequent to the making of the contract. Hops, which grow from ancient roots, and which may yet be emblements (Coke Litt. 556*b*) though at first sight are exceptions, really fall within the rule.

In *Latham v. Atwood*, 1 Croke, Car. 515, hops, were held to be like emblements, because they were such things as grow by the manurance and industry of the owner by making of hills and setting of poles; that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables.

In Wood on the Statute of Frauds, section 199, it is stated that, "according to the principles here established, it would seem that the crop of hops of the first year in such cases would be *fructus industriales*, but that of subsequent years like fruit on trees would be *fructus naturales*, unless requiring cultivation, labor and expense, for each successive crop as the hops do, in which event they would be *fructus industriales* till exhausted. Benj. on Sales, sec. 130.

Why does not this rule apply to the product of the orchard?

There are many fruit-bearing trees indigenous to our forests, whose annual products possess a very considerable commercial value. The fruits of these are the spontaneous productions of the earth, and are not annual productions raised by the manurance and the industry of man, and these are *fructus naturales*. Would the fruit of the apple and the peach tree be classed with these? It is common observation and experience, that the orchard, the vineyard and plantations of blackberry, raspberry and strawberry cannot be made to annually produce without the manurance and the industry of man.

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The orchard must be pruned, fertilized, cultivated and protected against the swarming millions of its insect enemies, with care, during each recurring year, or it will fail to produce.

It seems to us that the rule, that declares hops for the first year *fructus industriales*, but that of subsequent years *fructus naturalis*, unless they require cultivation, labor and expense, for each successive crop, as is the case which renders them *fructus industriales*, ought to apply to the orchard and the blackberry plantation, for they are within the reason of the rule.

We are aware that this view is in opposition to the doctrine announced in a class of cases of which *Gunn v. Armstrong*, 1 Denio, 550, is a type.

We think that as the growing crop of fruit for any year, like the hop, is *fructus industriales* for that year, that for subsequent years, for the same reasons, that hops otherwise *fructus naturalis*, are declared to be *fructus industriales*, so ought it to be.

By the contract, as we interpret its meaning, the plaintiff was not to own said orchard products, while they were growing, and not until after they were delivered and became chattels.

And whether the fruit was in existence at the time the contract was made, or to be produced out of the soil afterwards, by the manurance and labor, becomes important in the view we entertain of this case.

Having reached the conclusion that the fruit to be raised and produced in the orchard for each successive year mentioned in said contract, should be classed as *fructus industriales*, that it is not, therefore, a chattel real, and that the contract concerning the same need not be in writing.

But the defendant contends that even if the contract sued on concerned chattels personal, that the same is still within the operation of the statute of frauds, because it was not to be performed within a year.

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This contention must be sustained unless it be that the plaintiff has fully performed said contract on his part. *Self v. Cordell*, 45 Mo. 345; *Suggett v. Cason*, 26 Mo. 221; *McConnell v. Brayner*, 63 Mo. 461; *Winters v. Cherry*, 78 Mo. 344.

The uncontradicted evidence was, that the plaintiff in the performance of his part of said agreement cancelled and delivered up the title bond, and executed and delivered to defendant the notes and deed of trust to secure the same.

This was the performance of his side of the agreement. What more was there for him to do. This action by him, devolved upon the defendant the performance of the other side of it. He gave the plaintiff the deed, but not the fruit. The provision of the agreement, as it was alleged, and shown by the plaintiff, was that the defendant was to do two things, one was to deliver plaintiff a deed to the land, and the other was to deliver one-half of the product of the orchard. One of the witnesses said the defendant promised plaintiff, in consideration of his making the concession requested by defendant, that the latter would "give plaintiff a deed for the land and one-half of the fruit for the years 1886, 1887 and 1888."

The word "give" is one of very wide and varying significance, according to some of the lexicographers. Webster's Dictionary: Give—one of its meanings is "to yield possession of, to deliver over as property in exchange." This word must be taken in the connection in which it was used, not in the common-law sense in which it is construed in leases, but in the sense in which it is commonly understood, namely, to yield possession or to deliver over as property.

The instruction for the plaintiff was based upon the hypothesis which, it seems to us, was not outside of the case as presented by the plaintiff's evidence. A fair and reasonable construction of the agreement, as it is made to appear in the plaintiff's evidence, is that the

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defendant was to deliver said products at the proper season of the year for gathering apples, peaches and berries, at the place where grown (*Waters v. McGongan*, 39 N. W. Rep. 382; 2 Wharton Ev., sec. 1249); but if none were produced on account of natural or other causes over which defendant had no control, that then none could be given the plaintiff. The production, of course, was a condition precedent to the delivery.

The plaintiff's petition, while subject somewhat to the defendant's criticism, we think, sufficiently states an action for the breach of the contract.

The measure of damages was the value of one-half of the product of the orchard, at the time the same was fit for delivery. *Suggett, Adm'r, v. Cason*, 26 Mo. 221.

If the facts, as alleged in the petition, are true as was found by the jury, that the plaintiff has fully performed his part of the said contract, it would be a fraud on him to permit the defendant to escape the performance of his part of it by interposing the defense of the statute or frauds.

The case seems to have been tried in the main correctly. The instruction given for plaintiff is inaccurate in expression, but as we cannot see that the giving of it could have misled the jury, to the prejudice of the defendant, we are not disposed to reverse the judgment on that account.

Upon an examination of the whole case, we are not able to discover any errors prejudicial to the defendant, therefore the judgment is affirmed. All concur.

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JACOB P. JONES, Respondent, v. JOHN T. DAVIS, Administrator, Appellant.

Kansas City Court of Appeals, May 20, 1889.

Administration: CLASSIFICATION OF DEMANDS. Under the statutes governing the exhibition and classification of demands against estates, demands exhibited to the administrator after the end of one year from the grant of letters are to be placed in the sixth class of demands. (These statutes and the limitation statute discussed and construed in the light of the Missouri cases.)

Appeal from the Holt Circuit Court.—HON. C. A. ANTHONY, Judge.

REVERSED AND REMANDED.

L. R. Knowles, for the appellant.

(1) The court erred in assigning said demand to the fifth class. It should have been assigned to the sixth class, for the reason that said demand was not exhibited against said estate for allowance for more than one year after date of grant of letters of administration upon said estate. R. S. 1879, sec. 184, art. 9. The whole theory upon which demands are classified under the administration laws in this state is entirely different from the statute of limitation. R. S., sec. 185, art. 9. (2) Section 222, article 10, requires executors and administrators to make annual settlement, and after the end of one year from date of letters the court may order a distribution. Sec. 243, art. 11. Therefore, if as contended by respondent that classification depends upon publication of notice of grant of letters, there would exist an irreconcilable conflict in the statutes. (3) In case *Williams v. Penn*, 12 Mo. App. 395, the court says: "The plain letter of this statute seems decisive of the question without recourse to the rules or

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principles of construction. The demand was first exhibited after the end of one year and within two years after letters granted. Such demands are assigned to the sixth class by the statute, hence nothing remains for the court to do but to announce in completion of the syllogism and giving effect to the statute that the claimant's demand is placed in the sixth class." *Bank v. Tutt, Adm'r*, 44 Mo. 366, and cases cited; *Bunchett v. Helfink*, 77 Mo. 376, and cases cited; *Bank v. Suman*, 79 Mo. 527; *Pleffer v. Suss*, 73 Mo. 245. (4) Some stress is placed upon the decision in case of *Spaulding v. Suss*, 4 Mo. App. 541, by counsel for respondent, but upon a careful examination of that decision it will be seen that so much of the decision as relates to the publication of notices, etc., is a mere *dictum*. All the questions before the court were decided in favor of appellant's theory of the law in this case.

T. C. Dungan and *E. Van Buskirk*, for the respondent.

(1) The probate and circuit courts both properly classified said allowed demand, by assigning same to the fifth class of demands. R. S. 1879, sec. 87; clauses 5 and 6, secs. 184 and 185; *Spaulding v. Suss*, 4 Mo. App. 541; *Bank v. Suman*, 79 Mo. 534; *Miller v. Janney*, 15 Mo. 268; *Williams v. Penn*, 12 Mo. App. 395. (2) There are but six classes of demands against an estate (see sec. 184, *supra*), and a strict literal construction of clauses five and six of said section 184 would as completely exclude from the sixth class all demands not legally exhibited within two years after the granting of the first letters, as it would exclude from the fifth class demands not so exhibited within one year after letters granted; and such was the fact prior the amendments of section 19, page 131, Revised Statutes, 1855, in revision of 1865, as now incorporated in Revised Statutes, 1879, section 87, and of section 185,

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Revised Statutes, 1879, as made by Session Acts of 1877, page 3, except as to claims accruing after grant of letters, as then the date for the classifications of demands in the fifth and sixth classes, as well as the date of the beginning of the running of the statutes of limitations, was from the granting of the first letters; but the effect of such amendments was, that said times for classification and limitations should only begin to run from the date of letters; where (when) notice of grant of letters should be published within thirty days, as provided in section 87, but in all other cases said times should begin to run or be counted from the date of such publication of notice of letters granted. R. S. 1855, sec. 19, p. 131; Gen. Stat. 1865, sec. 19, p. 490; R. S. 1879, sec. 185; *Spaulding v. Suss*, 4 Mo. App. 541; *Williams v. Penn*, 12 Mo. App. 395. (3) Section 222, Revised Statutes, 1879, requiring annual settlements by administrators has nothing to do with classification or limitation and throws no light upon the question involved. Nor does section 243, allowing probate courts to order distribution after the end of one year. (4) The time for proving claims, or exhibiting them for allowance begins to run from date of publication of notice, and not from the date of letters of administration. The law underwent a change by the revision of 1865. R. S. 1855, p. 131, sec. 19; Gen. Stat. of 1865, p. 490, sec. 19; R. S. 1879, p. 14, sec. 87; *Spaulding v. Suss*, 4 Mo. App. 541; *Williams v. Penn*, 12 Mo. App. 395; *Bank v. Suman*, 79 Mo. 534.

Ellison, J.—The following statement of facts were admitted in the trial court by both parties hereto to be true: "That the defendant, John F. Davis, was, on the seventh day of March, 1887, duly appointed administrator of the estate of Gilbert M. Dodge, deceased, by the probate court of Holt county, Missouri; and letters of administration were duly issued of that date; that the

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first insertion of the notice of granting letters was published on the thirteenth day of May, 1887, in the 'Mound City News,' a newspaper published in Holt county, Missouri; that the account, on which the judgment of the probate court was rendered, was exhibited to the said administrator on the first day of May, 1888, by serving upon said administrator a copy of said account in writing, and also with notice that the same would be presented to the probate court of Holt county, Missouri, for allowance, on the fourteenth day of May, 1888; that on said fourteenth day of May, 1888, the cause was continued till May 22, 1888; that on the twenty-second day of May, 1888, at a regular term of said probate court, the cause coming on for hearing, the parties to this action appeared in probate court in person and by their attorneys, a jury was had to which the cause was submitted. The jury returned a verdict for plaintiff in the sum of $451.59 to which finding no objection is now made. The probate court upon its own motion continued the case for classification until May 28, 1888; on that day the said demand was assigned to the fifth class, by said probate court, and defendant appealed therefrom. The plaintiff insists that said demand was correctly classified, which defendant denies and contends that the demand should be assigned to the sixth class of demands." The sole question is, as to whether said demand should be assigned to the fifth class or sixth class of demands.

It appears from these facts that the claim was exhibited more than one year after the letters of administration were granted, but within one year after notice of such letters being granted. The question, though touched upon several times by our courts, has never been settled in a case calling for a decision of the point. The chief embarrassment comes from conflicting views which appear to have been entertained by the courts, as will be seen by an examination of the cases of *Wiggins v. Lovering*, 9 Mo. 262; *Burckhartt v. Helfritch*, 77 Mo.

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376; *Spaulding v. Suss*, 4 Mo. App. 543; *Pleffer v. Suss*, 73 Mo. 245. As the question was not before the courts when these suggestions were made, or these views were expressed, and as all of them were made incidentally or argumentatively, we may consider the statute open for construction. Our opinion is that in order to be classified in the fifth class that the demand must be exhibited within one year from the grant or date of the letters regardless of when notice of letters was given.

It is evident that classification of a demand, and limitation of the same demand, are distinct matters, and that both depend solely on the statute for support. As to classification, the statute, section 184, is: "5. All demands without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate."

As to limitation, the statute, section 185, is: "All demands not thus exhibited in two years shall be forever barred, saving to infants, persons of unsound mind or imprisoned and married women, two years after the removal of their disability, and said two years shall begin to run from the date of the letters, where notice shall be published within thirty days, as provided in section 87, and in all other cases said two years shall begin to run from the date of publication of the notice."

It is thus seen, that so far as the letter of the statute is concerned, the claim is limited or barred in two years from *notice* of letters, but that it is classified in the fifth class, if it be exhibited within one year from the *granting* of letters.

It is, however, said in *Spaulding v. Suss*, *supra*, that the law underwent a change in 1865, and the time for proving claims to be placed in the fifth class "begins to run now from the date of publication of notice, and not from the date of letters, as was formerly the case. Wag. Stat. 86, sec. 19." The statute of 1855, section 19, page 131 (being the same in 1835 and 1845; R. S. 1835,

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sec. 19, p. 47; R. S. 1845, section 20, p. 75) is as follows: "Within thirty days after letters are granted, the executor, or administrator shall publish in some newspaper in this state, for three weeks, a notice that letters testamentary or of administration, have been granted to him, stating the date, and requiring all persons having claims against the estate to exhibit them for allowance to the executor or administrator within one year after the date of the letters, or they may be precluded from any benefit of such estate; and that, if such claims be not exhibited within three years from the date of the letters they shall be forever barred."

The statute of 1865 (Sec. 19, p. 490; Wag. Stat. 86, sec. 19; same in R. S. 1879, sec. 87) is as follows: "Within thirty days after letters are granted the executor or administrator shall publish in some newspaper published in the county, where letters of administration have been granted, and if no paper is published in such county, then in a paper published in any other county in the state nearest to the county where such letters of administration have been granted for three weeks, a notice that letters testamentary or of administration have been granted to him, stating the date, and requiring all persons having claims against the estate to exhibit them for allowance to executor or administrator within one year after the date of the letters, or they may be precluded from any benefit of such estate; and that if such claims be not exhibited within two years from time of such publication, they shall be forever barred."

It will be noticed that the only change made is as to the paper in which publication shall be made, and changing, in the last clause, the limitation of the time in which the action should be barred, from three years from the *date* of letters, to two years from the *publication* of *notice* of letters. It seems clear that no change was made in the time of exhibit for classification of demands.

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The fact that, while the latter statutes change the limitation from date of letters, to date of publication of notice, it makes no change in that part of the section referring to the classification, is a matter of much significance. Other portions of the same chapter, by strong inference at least, sustain the view we here maintain. *Burckhartt v. Helfritch*, 77 Mo. 376.

The only reason for the change was that, prior to statute of 1865, the courts held that notice of granting of letters, to be availing as a bar to claims, must be given within the time stated by the statute, that if not given within that time, though given afterwards, there would be no administration limitation. *Hawkins v. Ridenhour*, 13 Mo. 125; *Stiles v. Smith*, 55 Mo. 363. The statutes of 1865 and 1879, section 185, changes the rule and makes the limitation availing in two years after publication, though such publication be not in the time required by section 87.

It will doubtless be suggested in opposition to this construction, that if notice be not given, a claimant may be debarred the privilege of getting his demand in the fifth class. This suggestion occurred to the court in *Wiggins v. Lovering*, 9 Mo. 262, and in reply to it Judge SCOTT said: "Nor is the confusion in the classification of the debts against an estate, that it is thought will arise from a disallowance of the plea under the circumstances of this case, at all perceived. He who presents his claim after three years will not be paid until after the seventh class is satisfied. He cannot deprive other creditors of their diligence. They are in no better situation than he was. They had no more notice than he had. He cannot complain that he had no notice. The general statute will create a bar, although no notice is required or given, and although its limitation is shorter, as it frequently happens, than the special statute. The only effect of not giving notice is to take away the bar. He who does not present his claim within three years is in the situation of those whose demands

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do not accrue within that period from the date of the letters. Because no class is made for these, will they go unpaid?"

The trial court having taken the contrary view to that herein expressed, the judgment will be reversed and the cause remanded. The other judges concur.

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37 76 *Ex parte* HENRY S. MILLETT.

100 590

Kansas City Court of Appeals, May 20, 1889.

1. **Habeas Corpus:** CONTEMPT: ASSIGNEE REFUSING TO TURN OVER ASSETS. Where the circuit court has by proper order removed an assignee for creditors and ordered him to turn over the assets to a successor, which he refused to obey, and upon citation and hearing the court adjudges him guilty of contempt and commits him to jail until he obeys the order, and the commitment is regular in form and contains "the particular circumstances of the offense" which "in point of law amount to contempt," this court on *habeas corpus* cannot review the action of the circuit court and must remand the prisoner. *Quaere:* If such assets consisted of money only, whether such commitment would not be illegal as being imprisonment for debt?

2. ———: ———: ACTING AS ASSIGNEE AFTER REMOVAL. Where such assignee in disobedience of such order of removal proceeded to hear and allow claims against the estate, and on citation and hearing the court adjudged him guilty of a criminal contempt and assessed his punishment at a fine of fifty dollars and imprisonment of five days, the commitment being in proper form and reciting the necessary matter, this court cannot on *habeas corpus* discharge the prisoner.

3. **Judgment:** ORDERS OF COURT NOT SUSPENDED. Efforts made by the petitioner to appeal from the order of removal did not suspend such order.

Original Proceeding.

PRISONER REMANDED.

Frank Titus, for the petitioner.

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(1) Both of the orders of commitment annexed to the return of the marshall of Jackson county show that the imprisonment of complainant was for an alleged disobedience in not complying with the order or judgment of the circuit court removing him from his trust. Such non-compliance is alleged in the commitments to be a contempt. The petitioner avers that such non-compliance on his part is neither a contempt in law nor in fact. The orders of commitment recite that they were made to enforce the payment of "all the moneys, etc., * * * amounting to between twenty and thirty thousand dollars." Imprisonment therefor is not for contempt, but is imprisonment for debt. *Coughlin v. Ehlert*, 39 Mo. 285; *Galson v. Holman*, 4 S. E. Rep. (West Co.) 811; *In re Hess*, 1 New York Sup (West Co.) p. 811; *Mallory v Fox*, 20 Fed. Rep. 409. Imprisonment for debt is illegal in Missouri, and said orders are void. R. S. sec. 3728, p. 634; Const. Mo., sec. 16, art. 2. (2) The circuit court was without any jurisdiction to proceed in the enforcement of its judgment of March 9, 1889, in any manner or form after the service upon the judge of said court of the alternative writ of *mandamus* from this court commanding an appeal from such decision or that cause be shown to the contrary. And said judge placed himself in contempt in this court by so proceeding. *People v. Pendergrast*, 117 Ill. 588; s. c. in 6 N. E. Rep. 695. And, where a party is claiming property as of right, it is not a contempt to refuse to deliver up the same under an order of court. Rapalje on Contempts, secs. 155, 159; *State v. Start*, 7 Iowa, 501; s. c. in 74 Am. Dec. 278. (3) The orders of commitment herein do not allege matters which in point of law amount to a contempt. R. S., sec. 2651, p. 445. Nor do said orders or either of them specially and plainly charge contempt. R. S., sec. 2648, p. 444. But said orders do show, in connection with the other facts before this court, that the jurisdiction of the circuit judge has been exceeded in

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matter and person; that the same have issued under circumstances not allowed by law, and that such process is not authorized by any judgment, order or decree, nor by any provision of law. R. S., sec. 2650, p. 444. The circuit court being without lawful jurisdiction to proceed to enforce its judgment by reason of the premises, the orders of commitment are void. *Ex parte Snyder*, 64 Mo. 58; *State ex rel. v Loughlin*, 10 App. Rep. 5; *Ex parte Goodin*, 67 Mo. 637; *Ex parte Lang*, 18 Wal. 163. There is no contempt in disobeying an unlawful order. *Dowley v. Brown*, 43 How. Pr. 24; *Vincent v. Bamford*, 12 Abb. Pr. 254; *People v. Brennan*, 45 Barb. 347; *State v. Start*, 7 Iowa, 501. Jurisdiction is the power to hear and determine the matter in controversy. BALDWIN, J., in *Rhode Island v. Massachusetts*, 12 Pet 718; *Macfarland's Case*, 8 Abb. Pr. 63. (4) To constitute a constructive contempt some act must be done not in the presence of the court or judge that tends to obstruct the administration of justice or bring the court or judge or administration of justice into contempt. *In rel Dill*, 32 Kan. 668; s. c. in 5 Pacific Rep. 39; *The People v. Hackley*, 24 N. Y. 75. And the power to imprison as for constructive contempt is to be exercised only where no other adequate remedy can protect the public. *Gaudy v. State*, 13 Neb. 451; *State v. Doty*, 32 N. J. Law, 403; *State v. Matthews*, 37 N. H. 450; *Ex parte Grace*, 12 Iowa, 208; *State v. Anderson*, 40 Iowa, 207; *In re Hirst*, 9 Phila. 216. (5) To constitute a constructive contempt the act done by a party must not only be in defiance of the restraint, but must deprive the other party of some substantial right or affect some substantial interest in the controversy. *Butler v. Niles*, 35 How. Pr. 332. And if the contempt charged be purged by the accused by showing to the court that he acted under claim and color of right, and disclaimed and denied any intention to wilfully violate the order of the court as was done by the petitioner in the case at bar (see copy of his answer to

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the rule to show cause exhibit), he should be discharged. *Spink v. Francis*, 19 Fed. Rep. 678; *In re Colvin*, 3 Md. Ch. 300; *People ex rel. v. Kingsland*, 5 Abb. Prac. R. 90; *Bank v. Schermerhorn*, 9 Paige Ch. 373; *Wood v. DeFigeaniere*, 16 Abb. Pr. 7; *Same v. Same*, 1 Robertson, N. Y. 613.. (6) If it appears at the hearing that the court below was without lawful jurisdiction to commit the petitioner, either by virtue of the effect of the service upon it of the alternative writ of *mandamus*, or by other provisions of law, then the prisoner should be discharged. Authorities, *supra;* Hurd on Habeas Corpus, pp. 332-336; *Ex parte Snyder*, 64 Mo. 58; 10 Mo. App. 5; *Ex parte Perkins*, 26 Fed. Rep. 900; *Ex parte Lang*, 18 Wal. 163-169; *Geyger v. Story*, 1 Dall. 135; *Commonwealth v. Lecky*, 26 Am. Dec. note, pp. 42 to 49; *Ex parte Milligan*, 4 Wall. 3; *Ex parte Seibold*, 100 U. S. 371-474; *Ex parte Goodin*, 67 Mo. 637. That proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern them, see *Boyd v. State*, 19 Neb. 128; s. c. in 26 N. W. Rep. 925.

Henry Wollman & Wash. Adams, for respondent.

This court cannot in this proceeding consider the effect of the filing of the motion for a new trial on the order of removal, etc., etc. This court cannot receive any evidence or look back of the commitment. The circuit court had jurisdiction of Millett and of the subject-matter, its commitment is final in this proceeding. The regularity of the proceedings or the correctness of the decision of the circuit court cannot be inquired into by this court in this case. *Habeas corpus* proceedings cannot be used for the purposes of review in any sense. R. S. 2648 and 2651; *Ex parte Toney*, 11 Mo. 661; *In re Harris*, 47 Mo. 164; *Ex parte Goodin*, 67 Mo. 637; *Ex parte Boenninghausen*, 91 Mo. 301; *Ex parte Renshaw*, 6

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Mo. App. 474; *Ex parte Bowler*, 16 Mo. 14; *Ex parte Boenninghausen*, 21 Mo. App. 267; *Ex parte Snyder*, 29 Mo. App. 256.

GILL, J.—In order to a full understanding of the facts giving rise to this *habeas corpus* proceeding we refer to the case of "Millett, Relator, *v.* Field, Judge etc." It will be seen that on April 3, 1889, Judge FIELD, presiding over divison number 1, Jackson circuit court, ordered Millett to appear in court, April 8 following, and answer charges of contempt for disobedience of the orders of court made March 9, which commanded said Millett to deliver over the assets of said Ramsey estate to Allbritain, the newly appointed assignee, and to answer the charge of disobedience of order of removal, in that said Millett had, after said order was made, openly defied the orders of the court, had proceeded to act as assignee and had heard and allowed claims on March 18, 19 and 20. On said April 8, Millett appeared in court, filed answer to such charges, a trial was had before the court, and Millett was adjudged guilty of the charges and two separate commitments were made out, and under these Marshal McGowen justifies his custody of the prisoner.

In the one order of commitment the court fully sets out the facts with the order on Millett to turn over the Ramsey assets, etc., as made March 9, recites too the disobédience by Millett, and thereupon adjudges contempt, and orders Millett's imprisonment until he obeys said order. In the other order of commitment is found likewise recital of order of removal, and that Millett, in disobedience thereof, had on March 18, 19 and 20 proceeded and allowed claims against the Ramsey estate, and on account of which the court found Millett guilty of a criminal contempt, and adjudged, as a punishment therefor, a fine of fifty dollars and imprisonment for five days in the county jail.

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This court has no authority, under the law, to discharge the petitioner. Where a prisoner is "in custody, by virtue of a process from any court legally constituted, such prisoner can only be discharged in one of the following cases: *First*, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person. *Second*, where, though the original imprisonment was lawful, yet, by some act, omission or event, which has taken place afterwards, the party has become entitled to his discharge. *Third*, where the process is defective in some matter of substance required by law, rendering such process void. *Fourth*, where the process, though in proper form, has been issued in a case or under circumstances not allowed by law. *Fifth*, where the process, though in proper form, has been issued or executed by a person who is not authorized by law to issue or execute the same, etc. * * * *Sixth*, where the process is not authorized by any judgment, order or decree, nor by any provision of law." R. S. 1879, sec. 2650.

And further by section 2651 it is provided that "no court, under the provisions of this chapter, shall, in any other matter, have power to inquire into the legality or justice of any process, judgment, decree or order of any court legally constituted, nor into the justice or propriety of any commitment for contempt, made by any court, officer or body, according to law, and plainly charged in such commitment, as hereinbefore provided; but nothing in this section contained, nor any other part of this chapter, shall be so construed as to prevent any prisoner from being discharged when the matter alleged in the order of commitment shall not, in point of law, amount to a contempt." There can be no question that the petitioner was committed by a process from a legally constituted court, having jurisdiction of the person; that the process is in proper form, and that the commitment contains "the particular circumstances

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of the offense" charged, as required by section 1058, Revised Statutes.

And as we held in the *mandamus* case (*Millett v. Field*) there is no doubt but that the matters related in the order of commitment, "in point of law, amount to contempt" as required by section 2651, *supra.*

As oft repeated by the courts of the country a party cannot use the writ of *habeas corpus* as an appellate process, and we are not now, in this proceeding, authorized to review the action of the circuit court, to determine thereby if Millett was rightly or erroneously adjudged guilty of contempt. It is claimed, however, in behalf of the petitioner, that the court exceeded its jurisdiction.

There is no color for this claim, *unless* it be in that portion of the order which requires Millett to be held in custody until he shall have delivered over all the assets of said Ramsey estate; and since among these assets, it is said there is money, it is claimed that this is an imprisonment for debt, the right to which does not exist in this state. (39 Mo. 285.) Speaking for myself only I am inclined to the belief that in so far as the order of commitment may require Millett to pay over the money belonging to the estate, his imprisonment for a failure so to do would be illegal for the reason urged. Still it seems there are other assets, than money, belonging to said estate, and Millett's failure to deliver over the same will authorize the court to commit him to jail until said assets, at least, are surrendered as required by the court's order. *Ex parte Crenshaw*, 80 Mo. 447.

The fine of fifty dollars and five days' imprisonment, imposed by the court for the past offense of acting as assignee in allowing claims on March 18, 19 and 20, was within the statutory limit, and hence on that account no complaint can be made. Revised Statutes, 1879, secs. 1055 and 1056.

We repeat here, as held in the *mandamus* proceeding, that the efforts made by petitioner to appeal from

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the order of removal did not suspend the order of removal. The case cited from 117 Ill. is wholly inapplicable here.

The petitioner must be remanded to the custody of the county marshal. It is so ordered. All concur.

STATE *ex rel.* HENRY S. MILLETT, Relator, v. RICHARD M. FIELD, Judge, Respondent.

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52	318
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74	217
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80	219

Kansas City Court of Appeals, May 20, 1889.

1. **Appellate Jurisdiction.** In proceedings in *mandamus*, this court has original jurisdiction, concurrent with supreme court, bounded only by its territorial limits, and unlimited as to the values or the questions that it may involve, and its judgments therein are of like force and effect.

2. **Bill of Exceptions:** MAKING PART OF RECORD: DUTY OF JUDGE. Under the provisions of our statute law there is no way to complete and perfect the record by adding thereto the matters contained in the bill of exceptions, unless the judge of the trial court shall act in the matter. If the bill when presented is true the judge should sign it; if untrue, he should refuse to sign for that reason and certify thereon the cause of such refusal. If, after such refusal, three bystanders sign said bill and it be again presented, the judge, if he believe it to be true, should permit the same to be filed, and if he refuse to permit such bill to be filed, he should certify that it is untrue, and the issue whether the bill is true or untrue will be tried by the appellate court on affidavits as provided by the statute.

3. **Mandamus:** REMEDY AS TO ACTION ON BILL OF EXCEPTIONS. Where a bill of exceptions is presented to the trial judge for his signature it is his duty to act,—allow or disallow—and he cannot be permitted to sacrifice the right of litigants by his inaction; and *mandamus* is the proper remedy to compel him to act.

4. **Appeal:** RIGHT OF, FROM ORDER REMOVING ASSIGNEE. An order removing an assignee, and ordering him to turn over the assets of the estate in his hands to his successor, is such a final judgment, and the assignee so proceeded against is such a "party in interest to the proceedings," that he is entitled to have his exceptions saved and preserved and prosecute his appeal therefrom.

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5. **Definitions:** PARTY IN INTEREST. The meaning of "party in interest to the proceedings" as used in the assignment act is discussed in the opinion.

6. **Appeal:** RIGHT OF NOT FORFEITED BY CONTEMPT. It is clear from the facts in this case that at the time of presenting his bill of exceptions and asking his appeal, relator was in contempt of court in refusing to obey the order of removal and continuing to act as assignee, yet such contempt could not bar his right of appeal, which was a matter of strict right, not a matter of favor or grace of the court, and being so the court could not legally refuse its exercise.

7. **Judgment:** NOT SUSPENDED BY MOTION FOR A NEW TRIAL. The order of the court removing the assignee could not be suspended by the filing and pendency of a motion for a new trial and could only be suspended by a bond and an affidavit in appeal entitling the assignee to a *supersedeas*.

8. **Mandamus:** PEREMPTORY WRIT MUST FOLLOW ALTERNATIVE. The peremptory writ of *mandamus* must conform strictly with the terms of the alternative writ; and if more is demanded in the alternative writ than can be granted in the peremptory writ, then the peremptory writ must be denied altogether.

9. ———: CAN ONLY MOVE TO ACTION, CANNOT CONTROL DISCRETION. It is not the province of *mandamus* in dealing with subordinate tribunals to command any particular judgment, or to require the exercise of a discretion, reposed by law in such court, in a particular case. The superior court may command the lower court to move; and the penalty of an appeal bond, and the sufficiency of the securities thereon, are matters left to the judgment of the court where the same is to be filed, and it is not in the power of this court to exercise such judgment and discretion for, or on behalf of, such court.

Original Proceeding.

WRIT DENIED.

Frank Titus, for the relator.

(1) The order, judgment and decision of respondent of March 9, 1889, removing petitioner as assignee of J. H. Ramsey and ordering him to deliver the money and property of said estate to Wm. Allbritain, is such a final order or judgment as may be appealed from by petitioner. R. S., sec. 393, p. 60; R. S., sec. 3710, p.

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632; *State v. Allen*, 92 Mo. 20; *State ex rel. v. McAuliffe*, 48 Mo. 112; *Gale v. Michie*, 47 Mo. 326; *Slagel v. Murdock*, 65 Mo. 522; *Wise v. Darby, Adm'r*, 9 Mo. 131; *In re Loan & Trust Co.* (Sup. Ct. U. S. 1889), 9 Sup. Ct. Rep. 265; 2 Wall. 521; 3 Pom. Eq. 358; *Bank v. Wire Works*, 25 N. W. Rep. (Mich.) 202; 58 Mich. 124, 315; *Barry v. Briggs*, 22 Mich. 201, 206; *Dollard v. Taylor*, 33 N. Y. 496; *Ware v. Richardson*, 3 Md. 505; *Baker v. Leman*, Wright's Rep. (Ohio) 522; *James v. Ray*, 59 Mo. 280. (2) Relator is entitled to a peremptory writ commanding the granting of his appeal and the performance by respondent, of the ministerial functions of signing and permitting the filing of a bill of exceptions, and the accepting the affidavit for appeal and bond if the same be necessary. Const. Mo., art. 6, sec. 3; *State ex rel. v. Kansas City Court of Appeals*, 10 S. W. Rep. (Mo.), 855; *County Court v. Sparks*, 10 Mo. 118; *State ex rel. v. County Court*, 41 Mo. 221; 112 U. S. 50; High Ext. Leg. Rem., sec. 534; *Byrne v. Harbison*, 1 Mo. 225; *Hall v. County Court*, 27 Mo. 329; 94 U. S. 248; *Dane v. Derby*, 89 Am. Dec. 728–742, note; *People v. Pearson*, 33 Am. Dec. 445; *Ex parte Bradley*, 7 Wall 364, 375; Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Blackstone Com. 110. The amount of penalty filed by appellant in appeal bond is immaterial. Court below must file it, and allow appeal. *State ex rel. v. Adams, Judge*, 9 Mo. App. 464. (3) The effect of the issuance of the alternative writ is to suspend all proceedings by the circuit court to carry into effect its order on the assignee (relator) to pay over the money of his estate, and further to suspend all action on the order of commitment. *People v. Pendergrast*, 117 Ill. 588; s. c., 6 N. E. Rep. 695 (West); *State ex rel. v. Seddon*, 93 Mo. 520. (4) The relator as assignee of Ramsey is not an officer of the court in the legal and proper sense of that expression, but in this state he has

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always been held to be a purchaser for a valuable consideration in the highest sense of the term. *Gates v. Labeaum*, 19 Mo. 17, 26; *Bank v. Hughes*, 10 App. R. 17; 17 App. Rep. 61, 65. And such assignee cannot be arbitrarily or in the so-called discretion of a judge summarily deprived of his trust. In proceedings in this state to remove executors the appointment of an administrator *pendente lite* is by force of a statute. R. S., sec. 14, p. 4 ; *Lamb v. Heim*, 56 Mo. 420 ; *Rogers v. Dively*, 51 Mo. 193. Executors, as the supreme court at pages 430, 431, 56 Mo., declare, derive their powers not only from the will, but from the statutes, but this is not true in conveyances by deed in trust for creditors. And even in cases relating to executors a temporary administrator *pendente lite* occupies the position of a receiver. 67 Mo. 418 ; 56 Mo. 433. All of which is quite distinct from the procedure in the court below in the present case as set forth in relator's petition resulting in the judgment from which he prayed an appeal. (5) It is error in a trial court to issue execution as on a final judgment, exceptions or a motion for new trial being duly filed and undisposed of. *Stephen v. Brown*, 56 Mo. 23 ; 7 Dana (Ky.) 253 ; 4 Cal. 106 ; 13 B. Monroe, 234.

H. Wollman and *Wash. Adams*, for the respondent.

(1) The assignment matter, from the administration of which Millett was removed, involves over twenty-three thousand ($23,000) dollars. Millett has now in his hands, belonging to said estate, over twenty-three thousand ($23,000) dollars. This court by reason of the amount involved could have no jurisdiction by appeal, or other review proceedings over said estate, nor any matters connected therewith, and, where this court has no jurisdiction to review a case, it has no superintending jurisdiction over the lower court in such a case, in aid of an appeal, for that would give two courts jurisdiction to rule upon the same question, to-wit: The question

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as to whether a case was appealable, and we might have the predicament of the court of appeals deciding the question in the *mandamus* case one way and the supreme court, when the case got there, ruling the other. The amendment to the constitution was intended to avoid this. Amendment to Const. Laws, 1883, p. 216, sec. 5; *Prest v. Deaver*, 21 Mo. App. 209; *State ex rel. v. Seay*, 23 Mo. App. 629. If relator be entitled to an appeal, the right, not being qualified, carries with it the right to give bond and suspend the operation of the order to turn over the estate to his successor as well as the part of the order removing him. *The State ex rel. v. Lewis*, 70 Mo. 370. Hence the assets of the estate are involved in this appeal. There is no parallel to this proposition in the idea that this court has jurisdiction in appeal from unlawful detainer proceedings, though the value of the land exceeds the sum of twenty-five hundred ($2,500) dollars; for in unlawful detainer the title to the land is not in issue but the possession only. There is an obvious difference in the consequences of possession of real and personal estate, the latter may be lost, embezzled or carried away by the possessor; the former is not subject to any such contingency. The order to turn over is precisely the same as the judgment in a replevin suit. (2) *Mandamus* never lies where the party has any other adequate remedy whereby the relief sought may be accomplished. High Ex. Leg. Rem. [2 Ed.] secs. 15 and 16; *Dunklin v. County Court*, 23 Mo. 449; *Ex parte Chambers*, 10 Mo. App. 240; *State ex rel. v. Lubke*, 15 Mo. App. 152; *State ex rel. v. Horner*, 16 Mo. App. 191; *State ex rel. v. Marshall*, 82 Mo. 484. Revised Statutes of 1879, sections 3636–3643, as amended by Laws of 1885, page 214, provide a perfect, complete and adequate procedure for preserving exceptions where the court refuses to sign or allow filed a bill of exceptions, hence *mandamus* will not lie to compel a judge to sign or allow same to be filed in such a case. *State v. Thayer*, 15 Mo. App. 391; *State ex rel. v.*

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Wickham, 65 Mo. 634. Section 3714, Revised Statutes, 1879, provides fully that the appellate court or judges thereof may allow an appeal. (3) Millett being in contempt of court as shown by the return and affidavits, and his own reply filed herein, the court had a right to refuse to consider any alleged bill of exceptions presented by him until he purged himself of his contempt, and his counsel having admitted at the time he presented the papers, the allowance of which he is appealing to this court to compel, that he advised him to disobey the then existing orders of court, the court had the right, upon this ground alone, to refuse to recognize any application made by his said counsel also in the same proceeding. 1 Daniel Ch. Pr. [4 Ed] 504; *In re Wooley*, 11 Bush. [Kentucky] 95. This conclusion is necessary to enable any court to exact the respect due its authority, March 16, to turn over the estate. Rapalje on Contempt, secs. 23–24, 28; Thomp. Trials, sec. 135. (4) It is claimed that the filing of the motion for a new trial suspended the order of removal and to turn over the estate. This is not true. It did not suspend, postpone or impair its force in any way. *Ortman v. Dixon*, 9 Cal. 23; *State v. Horner*, 16 Mo. App. 199; *Vose v. Trustees*, opinion by Justice BRADLEY of the United States supreme court, 2 Woods. U. S. Circuit Court, 653 and 654; 53 N. Y. 404 and 405. (5) A court of chancery has a superintending control over all trustees. Bisp. Eq., p. 35, sec. 20; p. 190, sec. 147; *In re Pet. of Cohn*, for removal of Wentworth, assignee, 78 N. Y. 248, 252; Perry on Trusts, secs. 275, 279; secs. 817, 818; Hill on Trusts, pp. 298, 304; High on Receivers, secs. 821, 824. An assignee in a voluntary assignment for the benefit of creditors is a trustee. *Shockley v. Fischer*, 75 Mo. 502; Perry on Trusts, sec. 593; Pomeroy's Equity, secs. 994, 3636; Bisp. Eq., p. 107, sec. 66. Incident to such superintending control is the power of removal. *Pinneo v. Hart*, 30 Mo. 561; *Kehoe v. Taylor*, 31 Mo. App. 588. 593; 78 N. Y. 248, 252; *Hatcher v. Winters*, 71 Mo. 30,

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And such power may be exercised by motion made in a proceeding pending for administration of the estate as well by an independent proceeding. *Boggs v. Brooks*, 45 Mo. 233; Perry on Trusts, p. 261, sec. 282. (6) Relator has no appeal from order of removal. There is a paucity of authority upon this point, and we can only argue this upon principle and analogy rather than upon precedents which come down "on all fours." Millett, as an individual, is appealing, he desires to retain the office. No ruling affecting him in his representative capacity as an assignee is being appealed from by him in his representative capacity. From proceedings in chancery there is no common-law right of appeal in any case, hence, whatever right of appeal now exists is only that conferred by statute. *Schooner v. Woodworth*, 1 Scammon, Ill. 511; 13 Ill. 233; *Boggs v. Brooks*, 45 Mo. 233. Relator assumes his right of appeal under section 393 of the statutes of 1879. This assumption is obviously erroneous for the following reasons: *First*. The scope of the right of appeal, if it includes assignees at all, extends, according to the words of said section only, to proceedings as had under that chapter of the statutes. It expressly appears from the alternative writ that the proceedings removing Millet as assignee were not in virtue of this statute. The specific mention of one class in this section, as entitled to an appeal, excludes every other by necessary implication even if this section meant to extend the right of appeal to an assignee. The statute confers the right of appeal upon parties in interest only, viz., creditors or the assignor in a case of removal. There is no contract-right to hold an office, it may be abolished at the pleasure of the lawfully constituted authorities. *State ex rel. v. Davis*, 44 Mo. 128–131; Cooley's Const. Lim. [4 Ed.] top p. 334; *Pinneo v. Hart*, 30 Mo. 561; *Kehoe v. Taylor*, 31 Mo. App. 588–593; *Hanchett v. Waterbury*, 115 Ill. 220; Beach on Receivers, sec. 286; High on Receivers, sec. 225; *Railroad v. Railroad*, 55 Md. 153, 155; *Hull v. Caughy*, 66 Md. 104;

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State ex rel. v. Lewis, 76 Mo. 370. A right of appeal is therefore utterly inconsistent with what is required of a dismissed assignee in section 385 of the statutes; for it is provided in this section that when an assignee is removed the court shall order him to forthwith turn over the estate to his successor or other person designated by the court. *Oberkoetter v. Luebbering*, 4 Mo. App. 481; *The State v. Musick*, 7 Mo. App. 527; *Ladd v. Couzins*, 35 Mo. 513; *DeKalb County v. Hixon*, 44 Mo. 341; *Burgess v. O'Donohue*, 90 Mo. 299; *State v. Rowse*, 49 Mo. 593; *Henrichs v. Woods*, 7 Mo. App. 236; *Tufte v. Thompson*, 22 Mo. App. 564; *Zumwalt v. Zumwalt*, 3 Mo. 269; *Mellon's Appeal*, 32 Pa. St. 121; *Combs v. Draining Co.* 3 Metcalf (Ky.) 72.

GILL, J.—Upon a consideration of the record and evidence submitted, we find the material facts of this controversy to be as follows: In December last one J. H. Ramsey, a job printer, binder, etc., becoming financially embarrassed, made an assignment, under the statute, for the benefit of his creditors, and relator Henry S. Millett was made the assignee.

He qualified by giving bond, etc., and entered upon the discharge of his duties. In February, 1889, some of Ramsey's creditors filed a complaint in respondent's division of the Jackson circuit court, in which said assignment was pending, praying that Millet be removed as assignee. On March 9, following, the matter was heard by Judge FIELD, and an order was made, removing Millett from the trust, and appointing William Allbritain assignee in Millett's stead, said order directing and requiring Millett to deliver over all property, and assets of every description, belonging to the Ramsey estate, to the newly appointed and qualified assignee.

To this action of the court in removing Millett he, at the time, on said March 9, took exceptions, and filed his motion for a rehearing. After being duly qualified,

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by giving bond, etc., Allbritain served Millett with a copy of the order of March 9, and demanded the assets of the estate. Millett refused, and proceeded with the administration, as though no such order had been made, and among other things he sat as assignee, and heard and allowed claims of March 18, 19 and 20, in pursuance of a notice theretofore by him given.

At the next session of Judge FIELD'S court, on April 3, 1889, Allbritain, the newly appointed assignee, made report of this refusal by Millett and of his continued action as assignee, and the judge then and there directed an order citing Millett to appear April 8, following, and show cause why he should not be punished for a contempt for disobedience of the order of March 9, and for continuing to act as assignee, by allowing claims, etc. Millett, through his attorney then present on said April 3, while admitting disobedience of the order of removal, and the holding himself out as assignee, passing on claims, etc., as charged, insisted that he was so justified in holding out as assignee, because of his pending motion for a new trial, and then and there expressed his desire to appeal the judgment of the removal. That with that desire and intention, he was then ready to present and have allowed his bill of exceptions.

Judge FIELD refused to consider any bill of exceptions in the matter, alleging two reasons, to-wit: That Millett was in contempt, and that, at any event, there was no right to an appeal from the order of removal.

On the same day, April 3, the motion for a rehearing, or new trial, on the order of removal, was taken up and overruled by the court and exceptions noted. Millett, through his attorney, tendered a bill of exceptions, as well as affidavit and bond for appeal, but Judge FIELD refused to consider the same—to pass on the sufficiency thereof, or to permit these papers or either of them to be filed, denying that Millett had any right to appeal, and asserting another reason, to-wit: That

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the applicant for appeal had no right thereto because of his admitted contempt—in disobedience of the order of March 9.

On this state of facts Millett, the relator, has asked this court to grant its writ of *mandamus* to enforce an alleged right to have his bill of exceptions allowed and signed, and affidavit and bond for appeal filed and appeal allowed from said order removing him as assignee.

I. We are confronted on the very threshold of this case with the respondent's objection to our jurisdiction. It is alleged in effect, as the Ramsey estate exceeds in value the sum of twenty thousand dollars that this court has no jurisdiction, in *mandamus*, in relation to anything connected therewith.

We think this is scarcely a debatable question. In proceedings in *mandamus* this court has original jurisdiction, concurrent with the supreme court, within the limits of its territorial jurisdiction, and its judgments therein are of like force and effect. Const. Mo., art. 6, sec. 12; Const. Amend. Laws, 1883, sec. 4, p. 216.

"The mere fact, that the controversy may, or even does, involve questions of which the supreme court has exclusive appellate jurisdiction, does not oust this court of its original jurisdiction." Section 5 of the constitutional amendment (Laws of 1883, p. 216) relates only to the appellate jurisdiction of this court. *State ex rel. v. Seay*, 23 Mo. App. 628; *In re McDonald*, 19 Mo. App. 372.

This court has original jurisdiction in the matter of this remedial writ, bounded only by its territorial limits and unlimited as to the values or questions that it may involve.

II. It is next urged by respondent, in his brief, that, even to admit relator's right to appeal from the order of removal, he is yet not entitled to *mandamus* as, it is claimed, relator has other adequate remedy. It is too well settled to require citation of authorities that

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the relator cannot invoke the extraordinary writ of *mandamus* if he has any other adequate legal remedy for relief. The question now is, has the relator (if entitled to an appeal) any other adequate remedy. In view of the position taken by the circuit judge, in the matter of the bill of exceptions sought to have allowed by relator, what could relator do towards taking the matter up for review to the appellate court? It is said he might apply to the appellate court for a writ of error as provided in article 12, Revised Statutes, 1879, or for an appeal as provided in section 3714, Revised Statutes; but how, under the circumstances of this case, could the unsigned bill of exceptions, sought to be allowed, be incorporated in the record? It is true the "record proper," as it is called, including therein the petition of the creditors for Millett's removal, his answer thereto and judgment of ouster could be brought up by writ of error or appeal allowed by an appellate judge, but is there any mode provided by the law by which Millett could have completed or perfected this record, by adding thereto the matters contained in the bill of exceptions? We answer no, under the circumstances of this case.

Under the provisions of our statute law there is a way to perfect and settle a bill of exceptions, *provided* the judge of the circuit court shall *act* in the matter. If the bill, as presented by the litigant, is *true*, then there is a mandatory obligation on the judge to allow and sign the same, and it thereby becomes a part of the record of the cause. R. S., secs. 3635 and 3639.

If such bill, in the opinion of the judge is untrue, then the judge may refuse to sign the same for that reason, "*and he shall certify thereon the cause of such refusal.*" R. S., sec. 3637. Then a further step is provided, to-wit: By section 3638, Revised Statutes, after such refusal by the judge (and the refusal on the bill endorsed) the litigant may secure the same to be signed by three bystanders, and it shall then again be presented to the judge, and he shall, if he shall then believe it to be true, permit

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the said bill to be filed. Then, further, if the judge even yet refuse to permit such bill to be filed, "and shall have certified that it is untrue," then (and only then) is it permitted either party to "take affidavits, not exceeding, five in number, in relation to the truth of such bill." R. S., sec. 3640. "Such affidavits shall then, within five days after the return of such bill of exceptions, so *certified to be untrue*, to the party presenting the same, be deposited in the clerk's office, and, on appeal or writ of error, copies of such affidavits shall be annexed to and form a part of the record of the cause." See section 3641, as amended, Laws, 1885, p. 215.

An issue of fact then is made by this rejected bill of exceptions, endorsed by the circuit judge that it is untrue; and affirmed to be true by the party presenting the same—and this issue is tried and determined by the court to which the appeal is taken, where if the appellate court finds in favor of the bill, and that it is true, such court will admit the same as part of the record. R. S., secs. 3642 and 3643.

It will be observed, by a careful consideration of these statutory requirements, relating to a bill of exceptions, that, before a suitor can get the benefit of a bill signed by three bystanders, the said bill must have been disallowed by the judge, and refused by him because untrue, and the cause of such refusal certified thereon under the hand of such judge. And it is equally clear that, before a suitor can ask an allowance of a bill of exceptions by the appellate court, he must show a compliance with the antecedent steps—that the bill was presented to the circuit judge and disallowed by him for the reason that it was untrue, and that such refusal was endorsed thereon, stating the reason therefor and that thereupon he had made further efforts to convince the judge of its correctness and had secured three bystanders to sign the same, and that even yet the circuit judge refused to permit the said bill to be filed. When *all* these antecedent steps are taken, *then the law permits the issue*

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of true bill, or not true bill, to be settled in the appellate court, on affidavits taken, and *not till then*. So, then, when Judge FIELD unqualifiedly refused to *consider* even any bill of exceptions submitted by Millett, much less to reject the same as untrue and endorse thereon the reason for his refusal, he effectually deprived Millett of the right to perfect the record by adding thereto the matter contained in his bill of exceptions.

Conceding then the principles, in this behalf contended for by the respondent, it is yet clear in our opinion, that *mandamus* is the proper remedy to enforce action in the matter. Not to advise the judge *how* he shall act, but that he should move in the matter. If the party litigant, in due season, presents what he claims a true bill of exceptions it is the duty of the trial judge to act thereon. If true he should allow it, if *untrue* he should, while rejecting the same, endorse his refusal on the bill, and there in writing assign his reason for such refusal. If the circuit judge refuses to sign and allow a bill of exceptions because it is untrue, the appellate court will not by *mandamus* compel an allowance. But the judge should act,—allow or disallow. He cannot be permitted to sacrifice the rights of litigants by his inaction. *State ex rel. Wittenbreck v. Wickham*, 65 Mo. 634; *State ex rel. Kinealy v. Thayer*, 15 Mo. App. 391; *Downing v. Shacklett*, 49 Mo. 86.

III. We next direct our attention to the principal matter of controversy, to-wit: Has relator Millett a legal right to appeal from the order or judgment removing him as assignee of the Ramsey estate? If, indeed, relator has no such right of appeal, then, of course, Judge FIELD rightly denied permission to file a bill of exceptions, or bond and affidavit for appeal. The solution of this question is found in the construction of our statutes on the subject. We have been referred to a number of authorities in relation to *receiver's* right of appeal on order of removal, and some few relating to such right in an assignee, but they lend little light to

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the decision of this case. These voluntary assignments are creatures of statute, and by our statutes the administration thereof is marked out.

Under our law controlling voluntary assignments (R. S. 1879, chap. 5), there are several proceedings, principal and ancillary, looking to the winding up of the estate. Among these may be mentioned the appointment, qualification and duties of the assignee, and then for his removal and appointment of another in his stead. We have, too, the manner of presenting and allowing claims by the assignee with a separate section providing appeals from the judgments of the assignee.

The assignee may be dismissed for various reasons assigned by the statute, such as failing to file an inventory, or to give bond, failing to pay over dividends, etc. Besides, by section 389, it would seem, the court may cite the assignee to appear and answer complaints of maladministration or unfitness preferred by creditors, and "to do and abide such order as to it shall seem fit and lawful in the premises," etc. Provisions are made for final settlement by the assignee, allowance of fees, compromising claims," etc. Then we have, in the latter part of this chapter on voluntary assignments relating to these various proceedings, a provision in reference to appeals to be allowed from the circuit court. Section 393 reads as follows:

"Exceptions to any of the decisions of the court, *in any of the proceedings* under this chapter, may be taken and preserved by any party in interest to the proceedings, as exceptions are provided for in ordinary actions; and appeals or writs of error may be made or taken to the supreme court, etc. * * * as, and upon the terms in ordinary cases, within sixty days after the final disposition of the proceedings in which such objections are taken, and not after."

Notwithstanding the able arguments of learned counsel, we discern no good reason for withholding the

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operation of this section on proceedings (such as the one against Millett) for removal of the assignee, selected and qualified, as he was, under the statute. He was a statutory assignee—a trustee—performing duties under that statute. He was proceeded against by creditors, as provided they might under section 389, and the court, after hearing, had pronounced judgment of ouster against said assignee. This was a final judgment, in one of the "proceedings under this chapter," and the assignee, so proceeded against, and against whom said order or judgment was rendered, was a "party in interest to the proceedings," and as such was entitled to have his exceptions to the court's rulings saved and preserved. We need not, in thus holding, disagree with the Kansas supreme court (15 Kas. R. 501), where it is held that "whenever the legislature has used a word in a statute in one sense, and one meaning, and subsequently uses the same word in relation to the same subject-matter, it will be understood to use the said word in like sense or meaning, unless there is something in the context, or the nature of things to indicate a different or more extended meaning." "Parties in interest" or "interested parties," wherever used in this statute, has the same general meaning. A creditor, seeking to have his claim allowed, is a party in interest, and so he is a party in interest when petitioning for the removal of the assignee. So, too, is the assignee a party in interest in proceedings against him for removal.

In determining the meaning of the words of a statute we shall assume they are used with their ordinary signification. "If the intention of the legislature is manifest and unmistakable, the plain meaning should never be sacrificed to verbal distinctions and technical criticism." *Boggs v. Brooks*, 45 Mo. 233. In their contention that an assignee has no interest and therefore not entitled to the appeal, the law-writers and

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judges are cited as declaring that an officer has no such *vested property* in his office as will save him from being disturbed, or his office destroyed by the power that created it.

This is an unquestioned law. The party selected to fill an office, created by the legislative power, has no such contract, no such vested right, but that the creating power may abolish the office during his term, unless of course some constitutional provision shall intervene to prevent. *Primm v. Carondelet*, 23 Mo. 22; Cooley on Const. Lim., side p. 276 *et seq.; State ex rel. v. Davis*, 44 Mo. 131. But even in such a case, where such right to an office is litigated, is not such an officer "a party in interest" in such litigation?

Would it be contended, that in a proceeding by *quo warranto* to oust an officer, that he would not be allowed an appeal, because he had *no vested right* to the office, such as could not be taken from him by the power that made the office. This order or judgment removing Millett was, too, such a final judgment and in such a proceeding from which an appeal would lie. *State ex rel. Spickerman v. Allen*, 92 Mo. 25; *McCrary v. Menteer*, 58 Mo. 446; *In re Estate of McCune*, 76 Mo. 200.

In *Spickerman v. Allen, supra*, the supreme court held, under a statutory provision similar to that in the assignment law, that a guardian was entitled to an appeal from the order of the probate court removing him, and *mandamus* was issued commanding an allowance of an appeal.

We have attempted no review of the numerous authorities from other states and from the text books as to the right, or want of right, of appeal which receivers may have, for the reason that, in our opinion, the statutes of this state have fixed the right in the assignee in this character of proceeding, and we are not called on to express an opinion as to the wisdom, or justice, of the law.

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Nor are we to answer the embarrassments, that may come, on the estimation of respondent's counsel, from permitting a distasteful assignee to continue official relations with an unwilling court. If this is the outrage, which eloquent counsel refer to as so alarming then we can only answer "thus the law is written," and we are absolved from any degree of blame in the matter.

IV. A further question is this: Was Millett's disobedience of the order of March 9, and his continued acts as assignee, in face of that order of the court commanding him to desist and turn over the assets to Allbritain, such as to bar his right of appeal?

From the facts as we find them, it is clear, that on April 3, when Millett tendered the necessary papers, and asked an appeal from the order of March 9, he was in contempt of the order and proceedings of the court to which he was applying. The evidence does not show an *intentional* wrong (as commonly understood) as it seems he was acting under advice of counsel. He was, however, in open disobedience of the orders of a court in the rightful exercise of its lawful jurisdiction. It matters not whether the order of removal was correctly made, or was improvident or erroneous. If the court had jurisdiction to make the order, it was contempt of court to disobey it. *State v. Horner*, 16 Mo. App. 192.

But it is contended by relator's counsel, that as there was a motion for rehearing or new trial pending, the order on Millett removing him and requiring him no longer to act as assignee, was thereby suspended. The pending of such a motion could have no such effect. That order could not be superseded, except by a bond and affidavit in appeal entitling the appellant to a *supersedeas*. *People ex rel. Day v. Bergen*, 53 N. Y. 410; *Ortman v. Dixon*, 9 Cal. 23; *Vose v. Trustees*, 2 Woods, U. S. C. C. But, being in contempt, was the court thereby authorized to deny Millett the right to appeal from its judgment. We think not. The right

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of appeal was a matter of strict right, not a matter of favor or grace of the court; and, being so, the court could not legally refuse its exercise. *Brinkley v. Brinkley*, 47 N. Y. 49; *Hazard v. Durant*, 11 R. I. 195.

V. Notwithstanding the merits of the controversy, thus far discussed, are so largely with relator Millett, yet from the nature and scope of the petition and alternative writ, we must deny the issue of a peremptory writ.

The petition and alternative writ declares and recites, that relator tendered his bond for appeal, that the same was in the penal sum of five thousand dollars, and was "executed by relator as principal with two sufficient securities." The alternative writ commands respondent, in addition to signing and allowing the bill of exceptions (if the same is true) that he also permit to be filed the "certain affidavit and bond for appeal heretofore tendered your said court," etc., "and if the same be *in form* according to law, to proceed to allow the appeal therein prayed for by said relator from your judgment," etc.

Now the relator, in our opinion, is shown to be entitled to a *portion of* that asked for in the petition, and commanded in the alternative writ. He is entitled to an allowance of the bill of exceptions, if true, and the right to file his affidavit for appeal, if in proper form, as prayed for, but this court cannot command the circuit judge to permit relator to file the appeal bond, alleged to be in the sum of five thousand dollars signed by relator and two securities. The penalty of that bond, and the sufficiency of the securities thereon, are matters to be left to the judgment of the court where the same is to be filed, and it is not in our power to exercise this judgment and discretion for, or on behalf of, said court. It is not the province of *mandamus*, in dealing with subordinate tribunals, to command

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any particular judgment, or to require the exercise of a discretion, reposed by law in such court, in a particular way.

The superior court may command the lower court to move, but not to move or decide a judicial act in a particular way. R. S. 1879, sec. 3713; *State ex rel. v. County Court*, 68 Mo. 48; *State ex rel. v. Laughlin*, 75 Mo. 366; *State ex rel. v. St. Louis Court of Appeals*, 87 Mo. 376; High on Ex. Leg. Rem., sec. 533.

The peremptory writ of *mandamus* must conform *strictly* with the terms of the alternative writ. If more is asked for in the relator's petition, and demanded in the alternative writ, than can be granted in the peremptory writ, then the peremptory writ must be denied altogether.

It seems a harsh rule, but such is now well settled in this state by our supreme court, and by its rulings we are constitutionally bound. In 53 Mo. 156, and 73 Mo. 627, it was held otherwise, and it was said that the relator should be entitled to a remedy corresponding with the case made, even though the peremptory writ might differ from the alternative.

However these cases have been expressly overruled, and the law is as above declared. Says HENRY, J., in delivering the court's opinion in *State ex rel. v. Railroad*, 77 Mo. 147:

"Holding that relator is entitled to a portion of what is asked for, but not the balance, can we grant the prayer and award the peremptory writ for that to which he is entitled?" High in his work above cited says: "It is a well-settled principle that the peremptory writ must conform strictly to the alternate *mandamus*, being necessarily limited as to form by the terms of the alternative writ.

"In other words, the courts are powerless to award peremptory writ of *mandamus* in any other form than that fixed by the alternative writ. It follows, therefore, that, if the alternative writ commands the doing of several

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things, it is incumbent upon the relator, in order to entitle him to the peremptory writ, to show that he is entitled to the performance of *all* the things specified, and if he fails in any substantial part in establishing his title to any of the things sought, there can be no peremptory *mandamus*." See other cases cited, 77 Mo. at p. 148. This rule is adhered to in the later case of *School Dis. v. Lauderbaugh*, 80 Mo. 190. We cannot command the filing of this appeal bond. It may, and probably will, be unsatisfactory in *amount*, if not in the matter of the persons offered as securities.

Being unable then to award a peremptory writ of *mandamus* conforming to the alternative writ, we must deny the same. Writ denied. The judges all concur. ELLISON, J., expresses no opinion on division number 3 of this opinion.

B. T. KING AND CALLIE E. KING, Respondents v. THE ALLEMANIA FIRE INSURANCE COMPANY, Appellant.

B. T. KING AND CALLIE E. KING, Respondents v. THE BRITISH AMERICAN ASSURANCE COMPANY OF TORONTO, CANADA, Appellant.

St. Louis Court of Appeals, May 21, 1889.

1. **Practice, Appellate:** WEIGHT OF EVIDENCE. Although a case was tried before a court sitting as a jury, and the evidence in support of the theory of the appellant was strong, while that in support of the theory of the appellee was weak, an appellate court will not reverse the conclusion reached by the trial court, provided that each theory was supported by substantial evidence and was submitted upon proper declarations of law.

2. **Practice, Trial:** INSTRUCTIONS. An instruction which comments upon the evidence is properly refused, even when the cause is tried by the court sitting as a jury.

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Appeals from the Greene County Circuit Court.—Hon. W. D. Hubbard, Judge.

Affirmed.

Good & Cravens, for the appellants.

Boyd & Del^ney, for the respondents.

Thompson, J., delivered the opinion of the court.

This case presents the same questions which were presented in the case of these plaintiffs against the Ætna Insurance Company, number 4319, and also in the case of these plaintiffs against the Insurance Company of North America, number 4343,—which cases were recently decided by this court,— but with this difference: In those cases, after the second loss occurred, the plaintiffs through B. T. King, acting under the advice of Captain Hubbard, received the money which it had been ascertained by the adjustment that those companies were liable to pay, and surrendered to the respective agents of those companies the policies issued by those companies to be cancelled in pursuance of the terms of the agreement which had been made on the adjustment of the first loss between the plaintiffs and the agents of those companies; whereas in this case, when the check for the amount which the defendant was to pay to the plaintiffs in settlement of the first loss (being, as in the other cases, the amount which had been ascertained to be due upon the adjustment, with a deduction of two per cent. in consideration of immediate payment, instead of a delay of two months, to which the defendant was entitled under the terms of the policy) came into the hands of the defendant's agent at Springfield for delivery to the plaintiffs, the agent ascertained that the plaintiffs had changed their minds, and, still acting under the advice of Captain Hubbard (who, it is to be observed,

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represented the four companies who had written the second insurance upon the property), changed their minds and concluded not to accept the money, if it involved a surrender and cancellation of the policy.

The plaintiff B. T. King testifies that the money was never tendered to him; but it appears from the testimony of the defendant's counsel that the check was offered to the plaintiffs' attorney on condition of the defendant being absolved from liability for the second loss, which offer was refused. Of course there is no claim on the one hand that a formal tender was made; and, on the other, there is no dispute that it would have been rejected if it had been made on the terms of settlement as understood by the defendant. That is to say, the only substantial difference between this case and the *Ætna case* and the *North American case* is that the defendant's check, drawn in pursuance of the agreement had with the adjusters, arrived a day later than the checks in those cases arrived, and when it arrived the plaintiffs had changed their minds. Why they had changed their minds does not appear, except that the plaintiffs were represented by the plaintiff B. T. King, and he professes to have been wholly ignorant of his legal rights and to have acted implicitly on the advice of Captain Hubbard. The four companies, thus writing the second insurance, paid to the plaintiffs the sums for which they would be liable for the second loss, upon the theory of the four companies who have not settled for the first loss being obliged to participate in the payment of the second loss. At the same time they took from the plaintiffs an agreement, the substance of which was that they would prosecute actions to ascertain the liability of those four companies in respect of the second loss; and the plaintiffs at the same time agreed in substance with them, that they would not prosecute to judgments, actions which they had brought against the companies writing the new insurance, until the liability of the four old companies

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should be ascertained. This, as a conclusion of fact, seems to make the difference between this case and the *Ætna case* and the *North American case* very plain; and the plaintiff B. T. King substantially admitted that he was prosecuting this case for the benefit of the four insurance companies which had written the new insurance.

If, then, in affirming this judgment we are obliged to reach a result which is directly the contrary of that which we reached in the two former cases, it is to be confessed that we reach a result which is almost mathematically absurd. But, however incongruous the result at which we arrive may be, when compared with our decisions in the former cases, it seems unavoidable; for each case must stand upon the law as applied to its own facts, and we must, in the determination of each case, follow and apply the settled rules of law and procedure.

The evidence is to the effect that the basis of settlement between the plaintiffs and the twelve companies who were liable for the first loss was the same in respect of each company, that is to say, the proportionate amount which each company was to pay having been ascertained, it was agreed that in consideration of a prompt payment instead of delaying for sixty days, as the agents of all the companies understood they were entitled to do, the plaintiffs were to accept the money with a deduction of two per cent. and surrender the policies for cancellation. But the difference between the plaintiffs' theory and the defendant's theory consists in this: According to the plaintiffs' theory the policies were to be surrendered for cancellation, and the liability of the defendants upon them should cease in each case when the money thus agreed to be received should be paid; but according to the defendant's theory the liability of each defendant (whether those that paid at once or those that paid as soon as their respective agents could communicate with their home offices) was to cease on the day on which the agreement was made.

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to-wit: on the sixteenth of March, although the plaintiffs were to hold the policies in each case until the money agreed to be paid by each company should be forthcoming. Now, the plaintiffs' theory is supported by substantial evidence, and the defendant's theory is supported by substantial evidence; and the fact that the evidence in support of the plaintiffs' theory may be weak while that in support of the defendant's theory may be strong does not enable us to overrule the conclusion upon the facts reached by the circuit judge who tried the cause sitting as a jury.

But we must of course look carefully to see, from the declarations of law given and refused, that the circuit judge tried the case on the proper theories of law, and especially that he did not ignore any applicatory rule of law brought to his attention in the form of a declaration of law tendered by the defendant. These declarations of law show that the court recognized the respective theories of fact of the opposing parties, and simply decided the case in favor of the plaintiffs upon the view which the court took of the weight of the evidence. This will appear from the following declarations of law given for the plaintiffs,—omitting what relates specially to the cases of the Ætna and North America:

"If the court, sitting as a jury, believes from the evidence that, after the first fire and the adjustment of the loss, the plaintiffs, in consideration of the promise by defendants to pay the loss as soon as a draft could be obtained, agreed and promised when the same was done to discount the loss two per cent. and cancel the policy and surrender the same, and that before the defendant paid or offered to pay said first loss to plaintiffs a second loss resulted from fire, then the liability of the companies defendant attached for said second loss, unless plaintiffs were guilty of some breach of the policy."

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"If the court, sitting as a jury, believes, from the evidence, that at the time of the adjustment of the first loss, and before the second fire, an agreement was entered into by and between the plaintiffs and defendants by which plaintiffs in consideration of the agreement on the part of the defendants to promptly pay the loss and raise no question as to plaintiffs having complied with the terms of the policy, or as to its liability thereon, agreed with defendants on the payment of said loss, as adjusted, to cancel and surrender the policy; and if the court further find from the evidence that before said payment was made or tendered and before said policy was cancelled or surrendered the second loss occurred, then said agreement does not discharge defendant of liability for said second loss, even if the court, sitting as a jury, believes from the evidence that after said second loss plaintiffs accepted payment of said first loss and surrendered the policy."

The court, at the request of the defendant, gave the following declarations of law: "That it was not necessary for the defendant, the Allemania Insurance Company, to have made a tender of the amount of the first loss, to avail itself of the defense in this case, that it was agreed between it and the plaintiff that the liability on its policy should cease the day the adjustment was made."

"If the court believes from the evidence that, when the adjustment of plaintiffs' first loss was made, it was agreed and understood by the plaintiffs and the defendant companies, upon the promise of the defendant companies to pay to plaintiffs the respective amounts agreed upon between plaintiffs and defendant companies on account of said first loss without controversy, that there should be no further liability on the policies of the defendant companies from and after the day that said adjustment was made, then, and in that event, the plaintiffs cannot recover.

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"If the court believes, from the evidence, that, on the day the first loss of plaintiffs was adjusted, it was agreed by and between plaintiffs and the defendant companies, that, if the defendant companies would pay their respective proportion of the losses that day, or as soon as drafts could be sent from the home office instead of waiting sixty days, the plaintiffs would discount the respective losses two per cent., and that there should from the day of said adjustment be no further liability on the policies of defendant companies, then and in that event the plaintiffs cannot recover."

The foregoing declarations of law show that the court applied the law as understood by each party to the theory which each party entertained of the facts. The only remaining question is whether the court erred in refusing certain declarations of law which were tendered by the defendant. These, so far as they relate to this defendant, were the following:

"That the contemporaneous and subsequent acts and conduct of a party to an alleged contract which go to show his interpretation of such contract are always entitled to consideration in determining the true meaning and intent of the parties to such contract; and if it appear from the evidence that after the adjustment of plaintiffs' loss of the fifth of March, and before their loss sued on in this action the plaintiffs informed other parties that the policy sued on, together with the other policies which were in force at the time of said loss, on the fifth of March, 1886, occurred, had been adjusted, settled and agreed to be surrendered, and were from the time of such adjustment no longer in force, and that being so advised by the agent of the companies afterwards issuing new policies they proceeded and took out through such agent new policies covering the full amount of the remaining stock on hand, such action and conduct on the part of plaintiffs will warrant the court in finding that the liability of the defendant and other

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companies similarly situated ceased on and after said adjustment, and that plaintiffs cannot recover in this action."

That this instruction is bad, as being a comment upon the weight and probative effect of the evidence, is too plain for discussion. It is not rendered good by reason of the fact that a jury were not in the box but that the facts were tried by the learned judge sitting as a jury. The principles by which instructions are tested are the same, whether the facts are tried by a jury or by the judge. Where the judge sits as the trier of the facts, a party can no more, by tendering an instruction, demand a response from the court which involves a mere conclusion of fact, than can be done where the trial takes place before a jury.

The next instruction tendered by the defendant and refused by the court was the following:

"That unless the court believes from the evidence that the plaintiffs demanded payment of the Allemania Insurance Company of the amount of the first loss under and pursuant to the agreement made between said company and plaintiffs that said first loss should be paid as soon as its draft came from Pittsburgh, and that liability on its policy should cease on the day of the adjustment of the first loss, if the court believes such was the agreement, and further believes from the evidence that upon such demand made by plaintiffs, that said defendant should comply with its part of the agreement, defendant refused to do so, then plaintiffs are not entitled to recover against defendant on the ground that defendant has failed to pay said first loss."

This instruction is worded so obscurely that we have had difficulty in understanding its meaning. But we take it to mean that if defendant's theory of the contract of March 16 is found to be true, the fact that the defendant has not paid what it agreed to pay under that contract in pursuance of a demand of the plaintiffs, does not entitle the plaintiffs to recover in this action.

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Of course it does not. Each loss furnishes a separate cause of action. The entire hypothesis of fact presented in this instruction might be cut out and the conclusion standing alone, that the plaintiffs are not entitled to recover in this action because the defendant has failed to pay the first loss, would be perfectly good. But the defendant got the full benefit of the principle embodied in this instruction in the first instruction given at its request as above set out, which stated without any qualification, that it was not necessary for the defendant to have made a tender of the amount of the first loss to avail itself of the defense which it sets up in this case.

It follows from the foregoing that we must affirm this judgment. It is so ordered. All the judges concur.

This case of B. T. King and Callie E. King, respondents, *v.* The British American Assurance Company of Toronto, Canada, appellants, was tried on the same evidence and comes here on the same bill of exceptions as in the case of B. T. King *et al.* *v.* The Allemania Fire Insurance Company. For the reasons given in the opinion filed in that case, the judgment of the circuit court in this case will be affirmed. It is so ordered. All the judges concur.

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ELIZABETH PAIN, Appellant, v. RUFUS PAIN, Respondent.

St. Louis Court of Appeals, May 21, 1889.

1. **Husband and Wife:** VALIDITY OF MARRIAGE. If a married woman remarry during the lifetime of her husband, her second marriage is void, although contracted in the belief that her husband is dead, and although the facts were sufficient to warrant a legal presumption of his death. The first marriage could only be annulled by the actual death of one of the contracting parties, or a decree of divorce.

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2. ———. The invalidity of a second marriage under such circumstances cannot be "condoned;" the doctrine of condonation has no application. The second marriage will remain a nullity though the second husband continue to live with the married woman knowing at the time that the first husband is alive.

3. ———: CONDONATION. The knowledge of an offense, which is requisite to a condonation of the offense, must be based on credible information; knowledge of a rumor of the commission of the offense will not suffice.

Appeal from the Lawrence County Circuit Court.
HON. M. G. MCGREGOR, Judge.

AFFIRMED.

N. Gibbs, for the appellant.

(1) A. N. Clark was married and resided in the neighborhood in which appellant was raised and has ever lived in this state. He went from this state more than nine years before his wife married the defendant, and he had never returned to this state nor been heard from. He was presumed to be dead and appellant had a right to act on that presumption. R. S. 1879, sec. 2330; *Hancock, Adm'r, v. Ins. Co.*, 62 Mo. 31; *Lancaster, Adm'r, v. Ins. Co.*, 62 Mo. 141, (121); *Kanz v. Great Council Imp. O. R. M.*, 13 Mo. App. 341; 1 Greenl. Ev., sec. 41; Reeve's Domestic Relations, 206; *McCaffey v. Benson*, 38 La. Ann. 198–200; *Strode v. Strode*, 3 Bush. [Ky.] 228, 229; 1 Stant. Rev. Stat. Ky., p. 380, sec. 9. (2) The cause for a divorce, that the party had a wife or husband living at the time of the marriage, must be considered as applying only to a party presumed to be alive, and the sections 2174 and 2330 harmonize. *Strode v. Strode*, 3 Bush. [Ky.] 228–229; 1 Stant. Rev. Stat. Ky. p. 380, sec. 9. Defendant admits that he lived with plaintiff for a time after he learned that her former husband was alive. That was condonation, or a participation in her guilt, and in either case he is not entitled to a decree. *Nagel v. Nagel*, 12 Mo. 53; *Hoffman v. Hoffman*, 43 Mo. 547.

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Henry Brumback, for the respondent.

Respondent proved that at the time of his marriage with appellant, and at the time of the trial herein, appellant's former husband, Clark, was living, from whom she had had no legal separation. Upon this proof a decree was properly rendered for respondent upon his cross-bill. "When a marriage has been solemnized between two persons and either party had a wife or husband living at the time of the marriage, the injured party may obtain a divorce." R. S., sec. 2174. While it may be assumed to be a fact that appellant's husband Clark had been unheard of for seven years, and more, still this merely raises a *prima facie* presumption of death, which has no application in the face of the fact that Clark is alive. The second marriage, conceding that it was contracted in good faith in the belief that Clark was dead, is nevertheless void. Clark being still alive, the offense was a continuing one, and there could be no condonation therefor. 2 Bishop on Mar. & Div. [4 Ed.] secs. 43, 64.

Biggs, J., delivered the opinion of the court.

The plaintiff alleged that she and the defendant were married in October, 1886. For causes of divorce the plaintiff alleged personal abuse and indignities, and that she was driven from home by the defendant and not permitted to return.

The defendant answered, denying the allegations of the plaintiff's petition, except the alleged marriage of the plaintiff and the defendant.

The defendant, by way of cross-bill, asked that the contract of marriage between plaintiff and himself be declared a nullity, and that he be divorced, for the reason that at the date of the marriage he believed that the plaintiff was unmarried, as she represented to him, whereas plaintiff then had a husband living, viz., A. N Clark.

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The plaintiff, for replication, averred that on the third day of October, 1875, she was married to one A. N. Clark, in Jasper county, Missouri, and that she continued to live with him as his wife until February, 1877, when he left this state without any known cause, and had never returned, and that he had not been heard of by anyone to plaintiff's knowledge, until after the institution of this suit; that her former husband having been absent for about nine years, the plaintiff, in good faith believing him to be dead, was married to the defendant.

The plaintiff and the defendant went to trial on these issues, which resulted in a decree dismissing the plaintiff's petition and sustaining the cross-bill of the defendant. From this judgment, Mrs. Pain has appealed.

We do not understand that the fact that A. N. Clark was alive at the time of the marriage of the plaintiff and the defendant is seriously controverted or denied. The testimony of his son, and other parties, furnished very satisfactory proof that he was living with one of his sons in the state of Kansas at the date of the trial.

The evidence is also quite satisfactory that A. N. Clark abandoned the plaintiff and his home in Jasper county, Missouri, in 1877, and that, after he left and previous to the institution of this suit, he had not been heard from by any one in the neighborhood where he formerly lived. It is also very clear that the plaintiff married the defendant in good faith, believing her former husband to be dead.

The plaintiff has presented for our determination, two questions: *First.* The validity of the second marriage. *Second.* Whether defendant is entitled to a decree annulling the contract of marriage, if, as a matter of fact, he lived with the plaintiff after he had learned that A. N. Clark was alive.

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Counsel for the defendant urged in the trial court, and now insists, that if A. N. Clark deserted plaintiff and left the state in 1877, and had not been heard of by any one where he lived for seven years prior to the plaintiff's marriage to the defendant, then the plaintiff, in marrying defendant, had a right to act on the legal presumption of Clark's death, and, if she married the second time in good faith, believing Clark to be dead, her marriage with defendant was valid.

Another position assumed by the plaintiff's counsel, is to the effect that, if defendant continued to live and cohabit with the plaintiff after he learned that Clark was alive, then the defendant is not entitled to any relief.

The plaintiff's first contention is contrary to the whole doctrine of the Christian marriage. The law is that no length of separation can dissolve the marriage ties. Nothing short of the actual death of one of the contracting parties, or the decree of a court of competent jurisdiction, can sever the marriage relationship. *Glass v. Glass*, 114 Mass. 563; *Williamson v. Parisien*, 1 John Ch. 389; *Spicer v. Spicer*, 16 Abb. Pr. [N. S.] 112; 1 Bish. Mar. & Div., sec. 299; Schouler's Dom. Relations, [3 Ed.] sec. 21.

Under the circumstances of this case, as established by the plaintiff's testimony, her belief in the death of her first husband on account of his continual absence for more than seven years, and her good faith in contracting the second marriage, would shield and protect her from criminal prosecution, but could not give any validity to the second marriage. Schouler, Dom. Rel., etc., *supra*, and authorities cited.

The plaintiff's counsel attempts to apply the doctrine of "condonation" to this case. The idea conveyed in his brief is to the effect, that if the defendant continued, for any length of time, to cohabit with plaintiff, after he learned that A. N. Clark was alive, then,

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by so doing, he condoned the plaintiff's conduct, and forfeited his right to have the court declare the marriage a nullity.

We do not think that the law of condonation has any application to such a case as the one under consideration. Mr. Bishop has defined the doctrine of condonation to be, "the remission by one of the contracting parties, of an offense, which he or she knows the other has committed against marriage, on condition of being afterwards treated by the other with *conjugal* kindness." 2 Bishop on Mar. & Div. [6 Ed.] sec. 33. This definition necessarily implies a valid marriage, and a lawful reinstatement of the matrimonial position or *status*. In the case under consideration, a reinstatement or continuance of the marital position, after knowledge that the first husband was alive, would be unlawful, and would render the parties liable to criminal prosecution. Therefore there can be no such thing as condonation in this case. We think that the court, in the interest of society and good morals, should not hesitate under any circumstances to annul such a contract, whenever the facts are made known.

But aside from this, the record fails to show that the defendant had any such credible information that A. N. Clark was alive, previous to the final separation of the plaintiff and the defendant. The defendant's admission on this subject was to the effect that, probably eight or ten days prior to the time defendant left his house, he heard a rumor in the neighborhood, that Clark was living. The "knowledge" of an offense contemplated by the law must be based on information obtained from credible persons having knowledge of the facts. 2 Bish., sec. 39.

The law in this case operates harshly against the plaintiff, but any other ruling would strike at the very foundation of all law governing marriage contracts. The decree of the circuit court will have to be affirmed. All the judges concur.

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Ex parte OLDEN, CRAMER AND BAKER.

St. Louis Court of Appeals, May 21, 1889.

1. **Jurisdiction of this Court.** While this court has the right to determine constitutional questions in cases in which it has original jurisdiction, the exercise of this right is inadvisable. (*Ex parte Boenninghausen,* 21 Mo. App. 267, *affirmed.*)
2. ———. A constitutional question is involved, when it fairly arises on the record of a cause, and is not a mere sham.
3. **Practice, Criminal:** VERIFICATION OF AN INFORMATION. The verification of an information is sufficient, though not made by the prosecuting attorney, and though made upon the best knowledge and belief of the affiant.

Thomas B. Harvey, for the petitioners.

The verification was not sufficient. The state constitution inhibits the seizure of any person upon warrant not "supported by oath or affirmation reduced to writing." Section 1762, Revised Statutes, permits the prosecuting attorney to verify informations upon "information and belief." The Session Acts of 1885, page 145, provide in reference to filing informations before justices of the peace, but do not modify the verification required by section 1762, nor do they attempt in any way to prescribe the character of verification. Section 19, Revised Statutes, page 1514, attempts to authorize a prosecution in the St. Louis court of criminal correction upon an information filed by the prosecuting attorney without oath, or by any person upon oath that "he believes it to be true." This court has held in a number of cases that, under the aforesaid special statute, verifications of the character of the one under consideration were sufficient and legal. *State v. Zeppenfeld*, 12 Mo. App. 574; *State v. Fitzporter*, 17 Mo. App. 271; *State v. Kaub*, 19 Mo. App. 149. In the recent case of the *State v. Bennett*, reported in Southwestern Reporter under date of April 22, 1889, page 264, our supreme

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court holds that said special law is in conflict with the general law of the state and must fall before it; and that an information in the court of criminal correction must be verified as in other parts of the state. The verification of the Bennett information is identical with the one at bar. The St. Louis court of criminal correction is of inferior jurisdiction and purely a creature of the statute (2 R. S., p. 1510), and can only acquire and exercise its jurisdiction in the manner prescribed by statute. Hurd Hab. Corp., sec. 3, pp. 360, 361; Church, Hab. Corp., secs. 278, 285, 268, 358; *State v. St. Louis*, 1 Mo. App. 402; *Jefferson Co. v. Cowan*, 54 Mo. 234; *Gibson v. Vaughn*, 61 Mo. 418; *Haggard v. Railroad*, 63 Mo. 302; *Ex parte Thomas*, 10 Mo. App. 24. And if the law requires the warrant to be supported by oath, that must appear on its face before the court has jurisdiction. Church, Hab. Corp., sec. 285, p. 364, and citations. Also *Ex parte Burford*, 3 Cranch, p. 448; *Stout v. Utah*, 80 U. S. 513; Church, Hab. Corp., sec. 223; *City of Kansas v. Flanagin*, 69 Mo. 34; *Ex parte Holdowell*, 74 Mo. 402; *Ex parte Thomas*, 10 Mo. App. 24. Jurisdiction is always an open question, and one imprisoned by a court without it can always be relieved by *habeas corpus*. Church, Hab. Corp., sec. 222, and 240; R. S., sec. 2650; *Ex parte Bethurum*, 66 Mo. 545; *Ex parte Slater*, 72 Mo. 102; *Ex parte Crenshaw*, 80 Mo. 447; *Ex parte Boenninghausen*, 91 Mo. 301. This court would have appellate jurisdiction of the case of petitioners, and therefore the objections to disposing of the question by *habeas corpus* do not apply as in the *Boenninghausen case. Ex parte Boenninghausen*, 21 Mo. App. 267; *Ex parte Siebold*, 100 U. S. 371.

J. R. Claiborne and *Ford Smith*, for the respondent.

(1) The statute points out no particular form of verification. It simply says that the information shall

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be "supported by the affidavit." The theory of petitioners then is that there is no affidavit supporting this information. But this position is not tenable. Here the ordinary and usual form of an affidavit is used; the form which has been used from time immemorial, which has always been used in Missouri both in civil and criminal practice. It is a form which has been expressly upheld by this court, and has never been declared insufficient by the supreme court. The affidavit in the *Hayward case* was upon "information and belief, and the information on which the *Bennett case* was decided does not appear to have been verified at all. For the authority in the *Bennett case* is the opinion; and not promiscuous papers brought in by petitioners' counsel. The words "according to his best knowledge and belief" do not weaken it in the least. They do not raise the slightest doubt as to the affiant's knowledge in the premises, or that he makes the affidavit upon knowledge. On the contrary they state that the affiant has knowledge, and that he makes the affidavit upon that knowledge, and not upon information. (2) A court will not discharge a prisoner on a writ of *habeas corpus*, for error which can be reached by writ of error or appeal. *In the matter of Toney*, 11 Mo. Mo. 661; *Ex parte Rithven*, 17 Mo. 541; *In re Truman*, 44 Mo. 181; *In re Harris*, 47 Mo. 164; *Ex parte Boenninghausen*, 91 Mo. 301; s. c., 21 Mo. App. 256; *Ex parte Snyder*, 29 Mo. App. 256; *Platt v. Harrison*, 6 Iowa, 79; *In re Mary Eaton*, 27 Mich. 1. Courts will not permit the writ of *habeas corpus* to perform the function of a writ of error. The statute expressly prohibits the discharge of a prisoner detained in custody by virtue of the final judgment of any competent court. R. S., sec. 2648.

Rombauer, P. J., delivered the opinion of the court.

The petitioners were convicted of petit larceny in the St. Louis court of criminal correction, and sentenced

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to imprisonment in the city workhouse for the term of six months. While in the transient custody of the sheriff, they sued out this writ against that officer, claiming that the court, before which they had been tried, had no jurisdiction, and that they are illegally restrained of their liberty. The sheriff made return purporting to show that they were convicted upon information duly filed and verified, and that the trial court had full jurisdiction in the premises. The entire controversy turns upon the sufficiency of the verification.

The information is filed by the assistant prosecuting attorney of the St. Louis court of criminal correction, and is verified by one Barber only, who "upon his oath says that the facts stated in the above information are true, according to his best knowledge and belief." The point made by the petitioners is that the addition of the words, "according to his best knowledge and belief," renders the verification equivalent to one upon information merely; that under the constitution of this state, the information must be supported by oath or affirmation, and under Revised Statutes, section 1762, that oath or information, "unless made by the prosecuting attorney," cannot be upon information and belief.

We issued the writ in the first instance, because the petitioners made a *prima facie* showing under the *habeas corpus* act. We did so in *Ex parte Boenninghausen*, 21 Mo. App. 267. For the reasons fully stated in that case we must decline to pass on the merits of this application.

Under the constitution of this state, the supreme court has exclusive appellate jurisdiction of all questions involving the construction of the constitution of the United States, or of this state, and, while we have the power to determine constitutional questions in cases wherein this court has original jurisdiction, we have fully shown the inadvisability of so doing in *Ex parte Boenninghausen, supra*. The only difference between

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that case and the present is that in this case the prisoners' appeal would *prima facie* lie to this court, while in the *Boenninghausen* case it would have lain to the supreme court; that fact, however, is immaterial, in view of the further fact, that this case, like the *Boenninghausen* case, involves constitutional questions of which the supreme court has exclusive appellate jurisdiction.

In determining the meaning of the phrase "involving the construction of the constitution" as affecting the jurisdiction of this court, we have repeatedly held that, in order to oust this court of its appellate jurisdiction, the constitutional question should be one which is at least fairly debatable. In the recent case of *State ex rel. Campbell v. St. Louis Court of Appeals*, the supreme court, 97 Mo. 276, disapproved of this definition, holding that this court is ousted of its appellate jurisdiction when the constitutional question is one fairly raised on the record and is not a mere sham. Accepting that definition as conclusive, we must hold that we would have no appellate jurisdiction in this case, as the constitutional questions arising upon the record cannot be designated as mere shams, in view of the fact that the supreme court and this court have arrived at different conclusions touching their merits. *State v. Zeppenfeld*, 12 Mo. App. 574; *State v. Fitzporter*, 17 Mo. App. 271; *State v. Kaub*, 19 Mo. App. 149; *State v. Clarke*, 54 Mo. 17; *State v. DeBar*, 58 Mo. 395; *State v. Hayes*, 81 Mo. 574; *State v. Bennett*, decided March 18, 1889, and not yet reported. (11 S. W. Rep. 264.)

It thus appears that if we are to abide by our rulings in the *Boenninghausen case*, we must decline passing on the merits of this application, and remit the petitioners to the jurisdiction of a court which has general original jurisdiction, or exclusive appellate jurisdiction of constitutional questions.

Having said this, we might stop. As, however, the writ of *habeas corpus* is a writ of liberty, we do not

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desire to be placed in the position of having denied its benefit to a prisoner in any case, where his right is clear, and we have the power to entertain jurisdiction, on the sole ground of the questionable propriety of our so entertaining it. We are therefore justified to add that we are inclined to hold that the result would be the same, if we undertook to pass upon the case upon its merits. The oath of the affiant is that the information is true. The affidavit does not purport to be based upon the information of the witness, which may be mere hearsay, but upon his best knowledge and belief. We cannot see how the mere addition of the words, "to the best of his knowledge and belief," is in any way indicative of the fact that the affiant has no knowledge on the subject. The statute does not prescribe the form of the oath, but simply provides it shall be the oath of some person competent to testify, who has knowledge of the facts stated in the charge, as distinguished from mere hearsay information. It will be noticed that these informations not only state the doing of certain acts, but the intent with which the act was done, and that such intent was felonious under the statute, on which latter subjects the utmost that can be required of any witness is an honest belief. If the oath to these informations is to be made in a form, which constitutes the affiant a warrantor of the truth of all the facts therein stated, prosecutions by information might better at once be abandoned. While on the one hand a citizen should not be deprived of his liberty on a mere rumor, which may have no more foundation than neighborhood talk, on the other hand the prosecution of criminals should not be made impracticable, or next to impossible. The protection of the law should be accessible alike to the alleged criminal and the alleged victim.

We have examined the manuscript opinion of the supreme court in *State v. Bennett*, *supra*, but find nothing therein which is opposed to the views herein expressed. The information in that case is fully set out

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in the opinion, and does not purport to be verified by any one. That the original record in the case shows that the information was verified in a manner similar to the informations complained of in this case can make no difference, since the supreme court could pass only on the record as it appeared by the transcript before it, and not on the original record which it presumably never saw.

It results from the foregoing that the prisoners must be remanded to the custody of the sheriff. All the judges concurring, it is so ordered.

FRANK R. DEARING, Respondent, v. JOHN W. FLETCHER, Appellant.

St. Louis Court of Appeals, May 21, 1889.

Practice, Trial: INSTRUCTIONS. An instruction given to the jury by the trial court which was not warranted by the evidence is ground for reversal of the judgment.

Appeal from the Jefferson County Circuit Court. HON. JOHN L. THOMAS, Judge.

REVERSED AND REMANDED.

Thos. C. Fletcher, for the appellant.

The instruction was erroneous in assuming that respondent had a right to retain sixty-five dollars for his fees, in the entire absence of any proof that he had at any time informed respondent that he claimed that amount or that the services were worth that amount, or any amount whatever. The only evidence on the point at all is the appellant's testimony that the services were

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not worth what respondent charged. *Shirgess v. Crum*, 29 Mo. App. 644; *Brownfield v. Phœnix Ins. Co.*, 26 Mo. App. 390; *Doty v. Steinberg*, 25 Mo. App. 328.

Rombauer, P. J., delivered the opinion of the court.

The plaintiff, who is an attorney at law, sued the defendant upon an account for professional services, alleged to be of the reasonable value of one hundred and fifty dollars. The defendant set up for a counter-claim that the plaintiff had collected for him eighty-five dollars, which he had failed to pay over, and which, with interest, was still due.

Upon the trial, the plaintiff gave substantial evidence supporting his claim. In regard to the counter-claim he gave evidence that he had collected one hundred and twenty-five dollars for the defendant, out of which amount, he paid to attorney Tatum, by the defendant's direction, twenty dollars and retained for himself sixty-five dollars for legal services rendered to the defendant, other than those sued for herein, and deposited the residue, to-wit, forty dollars, to the plaintiff's credit in bank. The defendant admitted that the twenty dollars were thus paid Tatum by his authority, but neither admitted nor denied that he authorized the plaintiff to retain anything for himself.

The substantial controversy between the parties is touching the sixty-five dollars, as the jury, under the instructions of the court, found for the plaintiff both on the account sued for and on the counter-claim. The error complained of by the defendant is that the court under the evidence misdirected the jury as to the counter-claim.

The plaintiff gave evidence tending to show that the defendant had authorized him to retain of the one hundred and twenty-five dollars collected, not only the twenty dollars paid to attorney Tatum, but also enough

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to pay him, plaintiff, for services rendered prior to said time; but the plaintiff gave no evidence that he was authorized to retain for such services any *specified amount*, nor did he give any evidence tending to show *what such services were reasonably worth*, nor that the defendant ever accepted the forty dollars in settlement of the account. Upon this evidence, the court instructed the jury as follows:

"If you find from the evidence that after plaintiff collected said sum of one hundred and twenty-five dollars, he told defendant he would keep out enough of this sum to pay plaintiff for the fees defendant then owed him, as well as a fee defendant owed J. T. Tatum, and that defendant thereupon replied that it was all right, and in pursuance of this agreement plaintiff paid said Tatum twenty dollars and kept sixty-five dollars for his own fees against defendant in various cases, other than those mentioned in plaintiff's account, and deposited forty dollars in the bank to the credit of defendant, and that defendant accepted this forty dollars, and knew what plaintiff had done in paying said Tatum and keeping money for himself out of this sum collected, and made no objections to it, then defendant cannot recover any sum on account of that transaction."

The difficulty with this instruction is, that there is no evidence whatever in this case that the sixty-five dollars thus retained by plaintiff was a reasonable compensation for the services performed by him, or that the plaintiff was authorized to retain any specified amount, or even that the defendant was informed by the plaintiff, at any time prior to the institution of this suit, that he claimed sixty-five dollars for such services, and that the defendant assented thereto. The instruction was therefore unwarranted by the evidence, and should not have been given. For this error, the judgment must be reversed.

Reversed and remanded. All the judges concur

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P. H. Jones, Respondent, v. A. R. Berry, Appellant.

St. Louis Court of Appeals, May 21, 1889.

1. **Principal and Agent:** COMMISSIONS OF LATTER. If property is placed in the hands of a real-estate agent for sale, and a sale is brought about through the exertions of the agent, he is entitled to his commissions, even though the negotiations are conducted, and the sale concluded, by the owner of the land and the purchaser.

2. ——— : RESCISSION OF AGENCY. While the property in such a case remains unsold, the owner of it, in order to rescind the agency on the ground of the failure of the agent to make proper efforts to sell it, must give notice to the agent of the rescission.

3. **Practice, Appellate.** This court will not interfere with a verdict found under proper instructions which are predicated on the evidence.

4. **Practice, Trial:** INSTRUCTIONS. An instruction, which is correct as an abstract proposition of law, is properly refused, when there is no evidence on which to base it.

Appeal from the Greene County Circuit Court.—Hon. W. D. Hubbard, Judge.

Affirmed.

Kenna, Boyd & Delaney, for the appellant.

There is no evidence to sustain the verdict. And the evidence clearly shows that Jones did not sell the land. Under a contract for commission for selling land, the agent is not entitled to compensation unless he was the efficient procuring cause of sale. *McClave v. Paine*, 41 How. Pr. 140; *Earp v. Cumming*, 54 Pa. St. 394; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Chandler v. Sutton*, 5 Daly, 112; *Ward v. Fletcher*, 124 Mass. 224. The evidence tends strongly to show an abandonment of agency by Jones, and instruction marked "refused" should have been given. *Proudfoot v. Wightman*, 78 Ill. 553; *Peabody v. Hoart*, 46 Ill. 242;

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McClave v. Paine, 41 How. Pr. 140; *Earp v. Cumming*, 54 Pa. St. 394; *Wylie v. Nat. Bank*, 61 N. Y. 415; *Chandler v. Sutton*, 5 Daly, 112.

Thrasher, White & McCammon, for the respondent.

(1) Appellant in his brief argues that the court erred in giving declarations of law asked by the plaintiff; but he does not assign that action of the court as error, and this court will not examine that question. Rule 18 of St. Louis Court of Appeals; *Wheeler v. Met. Manufacturing Co.*, 23 Mo. App. 190; *Hill v. Morris*, 21 Mo. App. 260; *Moise v. Colcher et al.*, 18 Mo. App. 693; *Foster v. Trimble*, 18 Mo. App. 394; *Goodson v. Railroad*, 23 Mo. App. 81. The declarations of law given at the request of plaintiff, however, are amply sustained by the authorities. *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Love v. Owens*, 31 Mo. App. 510; *Duclos v. Cunningham*, 102 N. Y. 678; *Timberman v. Craddock*, 70 Mo. 641; *Goffe v. Gibson*, 18 Mo. App. 2; *Gaty v. Sack*, 19 Mo. App. 470. The third assignment of error by appellant is the action of the court in refusing proper instructions asked by defendant. There is no evidence on which to base the one declaration refused, and the action of the court in refusing it was proper, even if that declaration asserted a correct principle of law. *Railroad v. Farrel*, 76 Mo. 189; *State v. Miller*, 67 Mo. 607; *State v. Little*, 67 Mo. 626; *State v. Chambers*, 87 Mo. 409. (2) The declarations given by the court fully covered the whole case, and since the case was tried by the court as a jury there was no necessity for the declaration refused by the court. *Bell v. Kaiser*, 50 Mo. 150; *Meyers v. Railroad*, 59 Mo. 231, 232; *Karle v. Railroad*, 55 Mo. 482; *Carlisle v. Pack. Co.*, 82 Mo. 43. The court, under the above declaration, found for the plaintiff, and the facts so found are incontrovertible in this court. *Fox v. Young*, 22 Mo. App. 387; *Hurlbut v. Jenkins*, 22 Mo. App. 575; *State v.*

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Zorn, 71 Mo. 416; *Hamilton v. Boggess*, 63 Mo. 251; *Beck v. Pollard*, 55 Mo. 28; *Gaines v. Fender*, 82 Mo. 509; *Doering v. Saum et al.*, 56 Mo. 481; *O'Conner v. Standard Theater Co.*, 17 Mo. App. 678; *State v. Baber*, 74 Mo. 296; *Anderson v. Griffith*, 86 Mo. 550; *Schweitzer v. City of Liberty*, 82 Mo. 309; *Meyer v. McCabe*, 73 Mo. 240; *Gimbel v. Pignero et al.*, 62 Mo. 242; *Rea v. Ferguson*, 72 Mo. 226; *Chapman v. McIlwrath*, 77 Mo. 43.

Biggs, J., delivered the opinion of the court.

The plaintiff alleges that the defendant entered into a contract with him, by which it was agreed that if he would procure a purchaser for a tract of land belonging to the defendant, he should receive, as compensation therefor, all in excess of twenty-seven hundred and fifty dollars, that the purchaser would agree to pay; that the plaintiff procured a purchaser, and through his exertions the land was sold for three thousand dollars, which defendant received. The petition then avers a refusal to pay plaintiff the amount due him, to-wit, two hundred and fifty dollars. The answer was a general denial.

A jury was waived and a trial had before the court, and the plaintiff obtained a judgment for two hundred and fifty dollars. The defendant has brought the case here for review, and urges several reasons against the validity of the judgment.

The principal complaint made by defendant grows out of the instructions. The testimony of the plaintiff tended to show that the defendant placed the property in the plaintiff's hands for sale, and agreed to give him, as commissions, all that he could sell the property for in excess of twenty-seven hundred and fifty dollars; that this contract was made in June, 1885, and that the plaintiff immediately opened negotiations with one Henry Potter for the sale of the land, and offered it to Potter for three thousand dollars; that the negotiations

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continued between the plaintiff and the defendant on the one side and Potter on the other, until the spring of 1886, when the land was finally sold to Potter for three thousand dollars; that the defendant received the money and refused to pay plaintiff his commissions.

The defendant admitted the contract, but introduced evidence tending to show that the land was not sold by the plaintiff; that the defendant suggested to the plaintiff Henry Potter as a probable purchaser, and, in the summer of 1885, told the plaintiff that if he would sell the land to Potter, he would give the plaintiff, as commissions for his trouble, all in excess of twenty-seven hundred and fifty dollars; that the plaintiff did endeavor to make the sale to Potter, but failed, and that the defendant afterwards effected the sale himself, and that this was accomplished without any help or suggestions from plaintiff.

The plaintiff denied that the defendant suggested to him that Potter might buy the land, and he denied that the sale was finally consummated without any effort on his part, but claimed that the defendant was responsible for the delay in closing the trade.

The court gave the following instructions for the plaintiff:

"2. If the court sitting as a jury find from the evidence that plaintiff and defendant agreed that if plaintiff should find a purchaser for defendant's farm, the defendant would pay plaintiff, as commissions, all that plaintiff should get for said farm in excess of twenty-seven hundred and fifty dollars; that plaintiff afterwards went to see Potter, and at different times talked with Potter about Potter buying the farm; that Potter agreed to the price, three thousand dollars, and through plaintiff submitted a proposition to defendant to take stock in part pay therefor, which proposition was finally accepted by defendant, then the judgment should be for the plaintiff for two hundred and fifty dollars.

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"3. Plaintiff's right to recover is not affected by the delay of Potter and defendant in closing the sale after an agreement had been reached as to the price of the farm, and the terms of the sale, whether such delay was because of the defendant giving further time to Potter in which to consummate the purchase, or because of uncertainty in the defendant's title to said farm; and, if from the evidence, the court finds that defendant, after the price and terms of sale had been agreed upon, gave Potter time to close said sale, or to satisfy himself as to the title, and that finally this sale was made in accordance with the original terms submitted, and agreed to by Potter, and by defendant, through plaintiff, then the plaintiff is entitled to recover the amount asked for in his petition."

The court on defendant's motion gave the following instructions:

"1. The burden of proof is on the plaintiff to establish:

"*First.* The employment for the purpose, and on the terms mentioned in the petition, and

"*Second.* That plaintiff was the efficient and procuring cause of the sale by defendant to Henry Potter.

"2. If the court, sitting as a jury, believe from the evidence that the defendant, in consideration of the plaintiff's agreement to procure a purchaser for defendant's land, agreed to pay him all money received in excess of twenty-seven hundred and fifty dollars, then to entitle plaintiff to recover herein, the court sitting as a jury must also believe from the evidence that the plaintiff's acts must have been the efficient procuring cause of the sale.

"3. If the court, sitting as a jury, believe from the evidence that the defendant suggested Mr. Potter as a probable purchaser of the land and told plaintiff that if he (plaintiff) would sell the property to Potter, he (defendant) would give plaintiff all in excess of

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twenty-seven hundred and fifty dollars as commissions, these facts do not prevent defendant from making a sale direct to said Potter, and unless the plaintiff actually made the sale to Potter or was the efficient and procuring cause of said Potter buying from defendant, plaintiff cannot recover.

"4. Although the court, sitting as a jury, believe from the evidence that defendant in June, 1885, contracted and agreed with plaintiff, as in plaintiff's petition alleged, and that no time was fixed as to when the agency should terminate, yet the court declares the law to be that such employment is in law, only for a reasonable time, and what is a reasonable time depends on the intention of the parties as gathered from all the facts and circumstances in the case, and if, within a reasonable time, as herein defined, plaintiff failed to consummate the sale, and failed to induce Potter to buy, then defendant had a right to make a sale himself, without notice to plaintiff, even to a person to whom plaintiff introduced him, and if under these circumstances defendant sold in good faith, plaintiff cannot recover."

The instructions taken together properly declared the law.

It is well settled in this state, that if property is placed in the hands of a real-estate agent for sale, and a sale is brought about through the exertions of the agent, the latter is entitled to his commissions, even though the negotiations are conducted and the sale concluded by the owner of the land and the purchaser. *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638; *Goffe v. Gibson*, 18 Mo. App. 1.

There was evidence on which to predicate the instruction and the court having found the facts against defendant, we cannot, under well-established rules of appellate practice, interfere.

The defendant asked the court to instruct as follows, which the court refused:

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"Although plaintiff opened negotiations between the defendant and Potter, yet, if, after fruitless negotiations, plaintiff permits several months to elapse without any efforts to consummate the sale and without any advice to defendant that he is still attempting to consummate the same, the defendant then is justified in presuming that the agency is abandoned and without notice to the plaintiff he had a right to negotiate the sale himself, and if under these circumstances, he, defendant, sold the property to Potter without any aid from plaintiff, plaintiff is not entitled to recover."

This instruction is somewhat ambiguous. If defendant presented the instruction on the theory of voluntary abandonment of the contract by plaintiff, and a failure on his part for a considerable period of time to make any effort to sell the land, then it presented an abstract proposition of law that was correct. But the difficulty with this view is, that there is no evidence of such a state of facts. Plaintiff testified that during the entire time he continued his efforts to sell the land to Potter, and in this he was substantially corroborated by Potter. It is true that defendant testified that plaintiff did not advise with him about the trade with Potter for several months prior to the sale (which plaintiff denies), but this did not prove that plaintiff was not during the time continuing his efforts to sell to Potter.

The instruction cannot be sustained on the idea that defendant, while the contract was executory, had the right to and did rescind the contract on account of plaintiff's failure to make proper efforts to sell, because if the defendant wished to avail himself of this right he could only do so, by giving plaintiff notice. *Gaty v. Sack*, 19 Mo. App. 478.

We will not undertake to discuss or pass on the specific objections made by defendant to plaintiff's instructions, as the objections are based on an alleged want of testimony authorizing the court to give them. We have read the evidence as preserved in the record,

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and we are satisfied that there was substantial proof to sustain the instructions and the finding of the court. We find no error in the record, and with the concurrence of the other judges, the judgment will therefore be affirmed.

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JULIA F. ATTAWAY *et al.*, Appellants, v. ISAAC HOSKINSON, Assignee, Respondent.

St. Louis Court of Appeals, May 21, 1889.

1. **Lease, Construction of.** The reservation in a recorded lease of a lien on personalty on the property leased is equivalent to a mortgage, covering, as between the parties to it, everything intended, and, as to third persons, everything within its terms.

2. ———. Such a reservation of a lien on the "furnishing" in a hotel is not, in the absence of evidence giving to this term some established meaning, effective as to third persons, because, without the aid of such evidence, the term is too indefinite to cover any specific property.

Appeal from the Laclede County Circuit Court.—HON. W. I. WALLACE, Judge.

AFFIRMED.

C. M. Napton and *J. F. Merryman*, for the appellants.

(1) The provisions of the lease that the furniture should be bound and subject to the payment of rent, renders it, in effect, a chattel mortgage to secure the rent. This was clearly the intent. Such contracts as this are sufficient to give an equitable lien having the same effect as a mortgage. *Mitchell v. Winslow*, 2 Story, 630; *Carter v. Holman*, 60 Mo. 498; *McQuie v. Peay*, 58 Mo. 56; *Blackburn v. Tweedie*, 60 Mo.

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505; *Worley v. Dryden*, 57 Mo. 226; *Wright v. Bircher*, 72 Mo. 179. (2) The plaintiff maintains that she got the prior lien by recording her lease (mortgage) before the executions were actually levied, and the authorities bear out the claim. *Shaw v. Padley*, 64 Mo. 519. The record in this case states that these four judgments were obtained before justices of the peace, but fails to show that this property was, in the language of section 3017, Revised Statutes, "within the limits within which the constable can execute the process." Hence the record fails to show the facts which would warrant the court in finding that these judgments were a lien prior to the equitable lien of plaintiff. Again, it is clear that plaintiff's lien is prior to the executions, as said section 3017 further provides that the executions shall not be a lien upon personal property which shall have been "sold or pledged to an innocent purchaser before the levy of the writ." It is conceded on all sides that these executions were not levied until after the lease was recorded. The plaintiff's equities are equal to those of the judgment creditors. *Wright v. Bircher*, 5 Mo. App. 322; s. c., 72 Mo. 179.

P. J. Nixon, for the respondent.

(1) The description of the personal property to which the lease was intended to apply is so indefinite and uncertain that no court could, under the facts agreed upon, identify the particular property to which the parties intend to attach the lien. The lease, our only guide, a copy of which is in the record, only provides that the "furnishing of the hotel" shall be bound for the rent. It is void from uncertainty of description. *Henderson v. Ford*, 81 Mo. 532; *Hughes v. Menefee*, 29 Mo. App. 206. (2) This being a proceeding at law to enforce a lien created by contract on certain specific personal property, the plaintiff has no

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lien on the proceeds arising from sale of the property. The lien arising out of the contract only being created by contract, its extent and limitations must be restricted to such contract. Appellants contend that the notice of clause in lien created a mortgage on the "furnishing." The stipulation provides that the court shall decide the rights of the creditors in the "proceeds of sale of said property, and whether the plaintiff has a prior lien." (3) The statute of fraudulent conveyances renders the lease and any lien created by it void as to all creditors. Possession of the personal property was never actually delivered to plaintiff; nor was the lease ever recorded until after Roberts made the assignment. The plaintiff clothed Roberts with the apparent ownership of said property, and allowed him to derive a false credit by the continued possession of the same. R. S., secs. 2501, 2503, 2505. The appellants dwell with much emphasis on the case of *Wright v. Bircher*, which has no application to this case, as the point there was that a lien may be imposed by contract on property to be acquired, and not *in esse*, and in that case the lease was recorded, and in all like cases the mortgage has been recorded. *Hughes v. Menefee*, 29 Mo. App. 202–203; *Rawlins v. Aean*, 80 Mo. 615; *Bryan v. Phain*, 18 Mo. App. 13.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiffs prosecute this appeal from an order of the circuit court, directing the assignee in the distribution of the proceeds of the sale of certain personal property, on which the plaintiffs, and other parties named in the order of distribution hereinafter referred to, claim conflicting liens. The question for decision is one touching the order of priority of such liens, and is to be determined upon the following statement of facts which were agreed to in the trial court.

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The plaintiff, Julia F. Attaway, was the owner of a hotel building in Lebanon, Missouri. On January 21, 1888, she made a lease thereof to one Roberts, which provided, among other things, that the *furnishing* in said hotel should be bound and subject to the payment of the rent reserved. This lease was not recorded until October 24, 1888. On October 23, 1888, Roberts made a general assignment to the defendant Hoskinson for the benefit of all his creditors, and the deed of assignment was recorded that day. Hoskinson knew that there was a lease, but did not know of its contents. Prior to that time, four judgments were rendered against Roberts, bearing dates respectively, July 21, September 1, October 13, and September 29, 1888. Executions were issued on these judgments, and were placed in the hands of the constable of Lebanon township, where the property was situated prior to October 24, but no actual levy on the property was made until after the recording of the lease mentioned. Subsequent to the assignment, one White brought an action for the purchase money of some of the furniture in the hotel, and obtained judgment on November 3, 1888. There is due to the plaintiff for rent, under the lease, $396.12, but what portion of such rent accrued prior, and what portion subsequent, to the assignment does not appear. One Wallace had a mortgage on the property, which is conceded to be entitled to priority over the plaintiffs' claim for rent.

The court, upon this showing, determined the priorities as follows: *First.* The mortgage of Wallace. *Second.* The judgment of White. *Third.* The four other judgments rendered prior to October 24. *Fourth.* The plaintiffs' claim, and those of other creditors, *pro rata.* The court also adjudged that the plaintiffs pay the costs. From this order the plaintiffs appeal.

We must observe at the outset, that there is nothing in the record to show that the property assigned by Roberts and its proceeds are insufficient to pay all the

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creditors in full. The plaintiffs assert in their statement filed in this court, that the assets are insufficient to pay anything beyond the third-class claims, but it would seem, that, as we cannot reverse a judgment except for prejudicial error, it is incumbent upon the appellants affirmatively to show by the record, that they were aggrieved by the judgment of the court. Their case in that respect rests solely on the assumption that one who makes a general assignment is presumed to be insolvent.

However this may be, the plaintiffs' claim must fail on more substantial grounds. We concede that the reservation in the lease was equivalent to a mortgage. *Wright v. Bircher*, 72 Mo. 179. As between the parties themselves, it was equivalent to a mortgage on everything which it was intended to cover; as to third persons it was a mortgage only on what it did cover by its express terms. The reservation is on the *furnishing* of the hotel, and there is no evidence whatever in the case that that term, by general usage in the community, means furniture, much less that it means furniture, utensils and personal property of all kind used in connection with a hotel, and which forms a part of the property assigned. The deed of assignment describes the property in detail, and not by the term *furnishing.* Webster does not recognize the existence of such a noun at all, while Worcester speaks of it as meaning *a sample.* How could the court without the aid of evidence, giving to the term used a generally accepted meaning in the community, declare that the mortgage covered the property assigned or any part thereof? The term used is too indefinite to cover any specific property, as no person could by aid of the mortgage, with such inquiries as the instrument itself suggests, identify the property conveyed.

Additional questions arise upon the record, as to whether the liens of the four judgments attaching to the property prior to the recording of the lease are not

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entitled to priority over the lien reserved in the unrecorded lease. On these questions we desire to express no opinion. The plaintiffs' claim must fail for uncertainty of description of the property on which the lien is reserved.

All the judges concurring, the judgment is affirmed.

STATE OF MISSOURI, Respondent v. THOMAS SMITH AND JOSEPH SMITH, Appellants.

St. Louis Court of Appeals, May 21, 1889.

Criminal Law: PLEA OF SELF-DEFENSE. When an assault is not due to premeditation or deliberation, but is the result of a sudden quarrel, and the aggressor is prosecuted, under Revised Statutes, section 1262, for a felonious assault with intent to kill, he is entitled to interpose acts done in self-defense, not as a complete defense to the prosecution, but to reduce the grade of the offense and in mitigation of the punishment.

Appeal from the Newton County Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED AND REMANDED.

Joseph Cravens, for the appellants.

(1) If the defendants had been convicted of the offense charged in the indictment, the punishment would have been "by imprisonment in the penitentiary not exceeding ten years," R. S., sec. 1262. While in the case of the *State v. Grimes*, 29 Mo. App. 470, and other recent cases decided by this court, it has been held that a defendant may be convicted of common or less degree of assault than the one charged; yet when the defendant is convicted of a less degree than the one charged, the verdict must specify the degree of which they find

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defendant guilty. R. S., sec. 1927. It is true this punishment might have been imposed by the jury under either section 1263 or 1265, but the verdict does not specify the degree of which they convict, whether of an "assault to kill," or "common assault." (2) The court erred in giving instruction number 2, as it does not specify the punishment as fixed by the statute. Sec. 1263. (3) The instruction asked by defendant should have been given. On the evidence, the defendants were entitled to have the question of self-defense submitted to the jury under proper instructions. *State v. Alley*, 68 Mo. 144; *State v. Foley*, 12 Mo. App. 431; *State v. Sneed*, 91 Mo. 522, 559.

Biggs, J., delivered the opinion of the court.

The defendants were jointly indicted under Revised Statutes, section 1262, for a felonious assault with intent to kill one Edward Love. They were tried, and convicted of an assault, and the jury assessed the punishment of each at a fine of one hundred dollars, and imprisonment in the county jail for a term of three months.

Whether the defendants were convicted for an assault with an intent to kill under Revised Statutes, section 1263, or of a common assault, under Revised Statutes, section 1265, cannot be determined, because the jury failed in their verdict to state the kind of assault, of which they found defendants guilty. Neither can this be determined from the punishment assessed, because the punishment inflicted was authorized by either section. The defendants urge this defect in the verdict as one ground for a reversal of the judgment.

The principal cause of complaint made by defendants in this court, and which goes to the merits of the defense, arises on the instructions of the court as to the law of self-defense. For the state, the court declared the law as follows:

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"He, who seeks a difficulty or voluntarily commences or enters into a difficulty, cannot afterwards set up that he was acting in necessary self-defense, and in this case *there is no evidence to show that either defendant was acting in his own necessary self-defense*, and if from the evidence you believe that either defendant committed an assault as set forth in either of the first three instructions, you should convict such defendant of the grade of assault of which the evidence shows him guilty," etc.

Defendant asked the following instructions, which the court refused to give, to-wit:

"The court instructs the jury that, although they may believe, from the evidence, that defendants, or either of them, threw and struck Love with a stone, yet if the jury believe, from the evidence, that said Love was, at the time, about to draw a pistol or other deadly weapon, or that defendant, Joseph Smith, had a reasonable cause to apprehend a design on the part of Love to do him some great personal injury, and that said defendant had reasonable cause to believe that said Love was about to carry such design into execution, then said defendant had a right to act upon appearances and to use all necessary means and force to protect and defend himself."

The court evidently concluded that the evidence showed conclusively that the defendants were the aggressors, and had sought and provoked the difficulty, and for this reason the plea of self-defense would not avail defendants. If there was any substantial evidence to the contrary, then the judgment cannot stand. The proper solution of this question involves an examination of the evidence for the defense.

Suffice it to say that the evidence for the state tended to show that the defendant, Joseph Smith, without any provocation, committed an assault on Love by striking him with stones, and that his co-defendant,

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Thomas Smith, was present, aiding, abetting and encouraging him in making the assault; that the fight began by Joseph Smith throwing a stone at Love and striking him on the hip, without doing any particular harm; that the parties then had a "fist-fight" resulting in the defeat of Love, but with little damage to either one of the combatants.

The defendants are the brothers of Love's wife, and, according to the testimony of the two defendants, the difficulty occurred in the following way: All the parties had been to Indian Springs to attend a Fourth of July celebration. Love and the defendants live north of Indian Springs, and in returning home they traveled the same road. There had been no previous difficulty or bad feelings between Love and the defendants, or between the latter and Mrs. Love, their sister. Love and the defendants met during the day at Indian Springs and spoke to each other as usual. The defendants rode home in a wagon with Robert Greene and family, and when they arrived near the house of Joseph Smith, they both got out of the wagon and started along a path leading up to Joseph's house, which was distant about one hundred yards. The prosecuting witness, his wife, daughter and son had stopped their vehicle near the path leading up to the house, for the purpose of procuring water to drink from a spring near by. The defendants spoke to their sister, and she refused to speak to or notice them.

Thomas Smith, in his testimony as to the beginning of the difficulty, said: "Me and my brother spoke to my sister and she wouldn't speak to us, and we asked her what was her reason she would not speak, and she didn't say anything at the time. We told her if we had done anything wrong we were ready to ask forgiveness and she *started* to *tell* us, when Ed. Love raised up and says: "I don't know as you and Joe has ever mistreated me, but the 'old man' (meaning defendants' father) has." Then my brother called him

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a liar. Then Ed. Love run his *hand* in his *left-side pocket* and his right *hand in his hip pocket*, and says, 'don't you lay your hands on me.' Then my brother stepped back and gathered up a couple of 'rocks' and threw at him. The first one missed him and the next one hit him on the left hip." "Q. Where was Ed. Love when he said to you that he didn't have anything against you, but the old man? A. He was standing in the wagon, then he stepped *out* of the *wagon* with one foot on the hub."

Joseph Smith, in speaking of the origin of the difficulty, said: "We (meaning himself and brother) got out of wagon and went up the path. * * * I spoke to my sister (Mrs. Love), and she would not speak to me." "Q. What did you say to her? A. I said good evening Lily or 'Day.' The most of the folks called her Lily. I think I said good evening 'Day,' and she wouldn't look towards us. I went up to wagon and says, what reason have you got for not speaking to me? Says I, if I have done anything to hurt your feelings, I says, I am willing to make acknowledgments. I says, I want to live peaceably and friendly with everybody, and if I have done anything I want to ask pardon. But she wouldn't say anything. Directly Ed. Love, who was standing on left hand side of wagon; I don't know exactly, but I think he had one foot in the wagon and one on the hub of the wheel, and he just remarked, 'Well I don't know that you (Joe and Tom) has ever done anything,' but he says 'your father has.' I says to him, you are a lying son of a bitch. Then he jumped up in the wagon and run one hand in his hip pocket and one in his side pocket like he was going to shoot, and I just grabbed up a couple of 'rocks' and 'throwed.' The first one missed him and the second one hit him on the left side. * * * He made a motion as though he was going to shoot, and he said for me not to hit him, or something that way. I thought he was

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going to shoot me, and I just gathered the 'rocks' and 'throwed' them as quick as I could."

The courts have had a great deal to say about the doctrine of self-defense, and it is the well-settled rule that where the defendant was the aggressor and sought and "brought on the difficulty," he cannot invoke the law of self-defense, even though he is forced to kill his adversary to protect his own life. But this is applied to its fullest extent *only*, when the attack was evidently premeditated and made after mature deliberation. If the assault was the result of a sudden quarrel, then the rule is somewhat relaxed and the circumstances may be shown to reduce the grade of the offense.

But we think that the better practice, in all cases, requires that the question as to who was the aggressor, and whether the defendant sought or induced the difficulty, ought to be left, under proper instructions, to the jury, unless the evidence is such that there cannot reasonably be but one answer to the question.

There is no evidence in the record that the defendants and Love had been unfriendly, or that there was any cause for ill will between them; nor does the evidence show any such feeling to have existed between the defendants and their sister. We are, therefore, warranted in assuming that the difficulty, so far as defendants were concerned, was unexpected and not the result of deliberation.

The defendants spoke to Mrs. Love and she refused to either speak to or notice them. She was their sister, and it was quite natural that they should inquire for the cause; and they both told her that, if they had given her just cause for offense, they were ready to make the necessary amends.

Thomas Smith says, that Mrs. Love was about to explain to her brother the cause of the trouble, when her husband interposed and made a statement which caused Joseph Smith to call him a "liar." Can it be said as a matter of law that the defendants under such

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circumstances were the aggressors, and "brought on the difficulty," or was this testimony sufficient to carry the question to the jury?

The testimony of the defendants themselves, as it is preserved in this record, shows no justification for the harsh epithet applied by Joseph Smith to Love. The remark made by Love that the father of defendant had mistreated him (standing by itself) is apparently inoffensive. There is nothing to indicate that the remark was made in an angry or offensive manner, or that the prior relations between Love and defendants' father had been such as to make the remark necessarily offensive to defendants. This being true, we would not be warranted in saying that there was any evidence in the case that the defendants were not the aggressors and did not bring on the difficulty, within the meaning of the law.

But as before indicated, the testimony of the defendants tended to prove that the assault was the result of a sudden quarrel and was brought on without any deliberation or premeditation on their part, and it also shows that the throwing of the stones was induced by fear on the part of Joseph Smith that Love intended and was about to shoot him. While we do not think that the action of Love, in threatening to draw a pistol, could have been interposed as a *complete* defense to this prosecution, for the reason that defendants provoked the difficulty, yet the defendants were charged with an assault, and with a felonious purpose to kill Love. Under this indictment the defendants could have been convicted of a premeditated and felonious assault with intent to kill under section 1262, or of an assault with intent to kill without malice under section 1263, or of a common assault under section 1265. The intent with which the defendants made the assault on Love was a very material inquiry, and the facts and circumstances tending to establish this should have been submitted to the jury, not only for the purpose of determining the

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grade of the offense, but in mitigation of the punishment to be inflicted.

Hence we think the defendants were entitled to have the jury consider the threatening attitude assumed by Love, which caused Joseph Smith to throw the stone, not by way of a perfect defense to the prosecution, but for the purpose of mitigating the offense and the punishment to be inflicted, and as having a tendency to show that the assault was not made deliberately or with the intention or design on the part of Joseph Smith to kill Love. *State v. Partlow*, 90 Mo. 608.

The consideration of this matter was taken away from the jury by the instructions for the state, and we cannot say that this error was not prejudicial to defendants. The verdict of the jury fails to state the offense of which the defendants were convicted, and, for aught that appears, the defendants were convicted of an assault with intent to kill under section 1263. If the views indicated by us had been submitted to the jury under proper instructions the result might have been different, not only as to the grade of the offense, but the punishment.

The instruction asked by defendants was properly refused, as it assumed that under the facts the defendants had a right to interpose the conduct and threatening acts of Love as a *perfect* defense to the prosecution and a justification of the assault.

But while the court did right in refusing this instruction, yet it was its duty to give such an instruction in lieu of the one asked and refused, as the law and the facts of the case justified. *State v. Matthews*, 20 Mo. 55; *State v. Stonum*, 62 Mo. 596; *State v. Branstetter*, 65 Mo. 155.

It will not be necessary to notice other errors complained of, as they are not likely to occur on another trial.

The judgment will be reversed and the cause remanded. All the judges concur.

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MANHATTAN BRASS COMPANY, Appellant, v. WEBSTER GLASS AND QUEENSWARE COMPANY, Defendant; JOHN STEPHENSON, Garnishee, Respondent.

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St. Louis Court of Appeals, May 28, 1889.

1. **Corporation.** An insolvent, but alive and active, corporation has the same right to prefer creditors as a natural person.

2. **Chattel Mortgage.** A provision in a chattel mortgage, which reserves to the mortgagor the right until condition broken to retain possession of the mortgaged property, and to sell it in the ordinary course of business, but requires him to pay to the mortgagee the net proceeds of sales, does not render the mortgage fraudulent *per se*, as being a conveyance to the use of the grantor.

3. ——. A chattel mortgage, which is fraudulent *per se*, because of a power of sale therein reserved to himself by the mortgagor, becomes valid, if possession of the mortgaged property is, prior to any levy thereon under legal process, taken by the mortgagee.

4. **Corporations:** NOTICE TO. The knowledge of facts, which is acquired by the officer of a corporation in the course of his private business, and not in his official capacity, does not constitute the knowledge of the corporation, and does not constitute notice to the corporation.

5. ——: CORPORATE ACTION. A conveyance authorized at a meeting, at which all the shareholders are present, and sign a written consent to the proceedings on the record thereof, pursuant to Revised Statutes, section 785, is as effective as if authorized by the directors of the corporation.

6. **Practice, Appellate:** PRESUMPTIONS IN FAVOR OF TRIAL COURT. When instructions given for an appellee in the trial court are mislaid, and therefore not copied into the transcript, the presumption is in favor of their correctness, and their having been mislaid is not ground of a reversal for the judgment.

Appeal from the St. Louis City Circuit Court.—HON. JAMES A. SEDDON, Judge.

AFFIRMED.

W. B. Homer, for the appellant.

(1) It appearing upon the face of the deed that the grantor was permitted to sell the property conveyed,

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"in the ordinary course of trade," and to pay over to the *cestui que trust* only the "net proceeds" and not the whole proceeds, the deed was void as being for the benefit of the grantor. *Stanley v. Bunce*, 27 Mo. 269; *Billingsley v. Bunce*, 28 Mo. 547; *Weber v. Armstrong*, 70 Mo. 219; *State v. Tasker*, 31 Mo. 445; *Reed v. Pelletier*, 28 Mo. 173; *White v. Graves*, 68 Mo. 223; *Dunlap v. O'Dena*, 1 Rich. [S. C.] 272; *St. John v. Railroad*, 22 Wall. 136; *Fuller v. Miller*, 105 Mass. 103; *State v. Mueller*, 10 Mo. App. 87. (2) The intention of this deed of trust was to give the defendant corporation the opportunity to compromise with its creditors, and for this purpose to hold the property free from the attacks of creditors, and the deed was therefore void. *Reed v. Pelletier*, 28 Mo. 177; *Bullene v. Barrett*, 87 Mo. 189; *Petring v. Chislet*, 90 Mo. 656. (3) The chattel deed of trust was void for the reason that the notes attempted to be secured were without consideration being given for the debt of Webster, and not for the debt of the corporation. 2 Morawetz on Corp., sec. 792; *Sumner v. Summers*, 34 Mo. 346; *Buckingham v. Fitch*, 18 Mo. App. 99; *Cordes v. Straszer*, 8 Mo. App. 61. (4) The defendant corporation possessed no power to execute this deed of trust, conveying all of its property to parties who were not creditors of the corporation. *Nat. Trust Co. v. Miller*, 33 N. J. Eq. 155; Taylor on Corp. [2 Ed.] secs. 273 and 274; Wood's Field on Corp. [2 Ed.] sec. 241, p. 386; *Stark Bank v. Pottery Co.*, 34 Vt. 148; *Smead v. Railroad*, 11 Ind. 109; *Jones v. Morrison*, 31 Minn. 147. "After the insolvency of a corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which, with the after-acquired property or assets of the corporation, they can look for indemnity. Both stand pledged for

the payment of the corporation debts." 2 Morawetz on Corp., secs. 788–792 and 794; Taylor on Corp., secs. 654, 657; *Nat. Trust Co. v. Miller*, 33 N. J. Eq. 155; *Roan v. Winn*, 93 Mo. 509; *Shickle v. Watts*, 94 Mo. 417; *Eyerman v. Krieckhaus*, 7 Mo. App. 455; *Chouteau v. Dean*, 7 Mo. App. 214; *Spurlock v. Railroad*, 90 Mo. 207; *Hutchison v. Green*, 91 Mo. 375; *Bent v. Hart*, 10 Mo. App. 146; *Single v. Hogan*, 45 Mo. 110; *Skrainka v. Allen*, 7 Mo. App. 437; Thompson on Liability of Stockholders, sec. 10. (5) The court erred in refusing instruction number "8" declaring, that as Aehle was chosen a director of the defendant corporation, at the request of the Continental Bank, in whose employ he was, that the bank was charged with the notice of the financial condition of the defendant corporation, as well as with the character of the indebtedness sought to be secured. *Corbett v. Woodward*, 5 Saw. 416; *Jones v. Ark. M. A. Co.*, 38 Ark. 17; *McLellan v. Board of Public Schools*, 15 Mo. App. 362; *Kitchen v. Railroad*, 69 Mo. 226; *Roan v. Winn*, 93 Mo. 509; *Leavitt v. LaForce*, 71 Mo. 356; *Packet Co. v. Davidson*, 95 Mo. 473. (6) The case should be reversed for the reason that the court unreasonably restricted appellant's examination of respondents' witnesses, they being the real parties in interest. *Smalley v. Hale*, 37 Mo. 102. (7) The action of the court in taking the instructions, and, after passing upon them, refusing to produce them for incorporation in the bill of exceptions, is such an error as will cause the reversal of the case. *Cunningham v. Snow*, 82 Mo. 593; *Altum v. Arnold*, 27 Mo. 264; *Easley v. Elliott*, 43 Mo. 289; *Wilson v. Railroad*, 46 Mo. 36; *Harrison v. Bartlett*, 51 Mo. 170; *Lawrence v. Shreve*, 26 Mo. 492.

Lee & Ellis and *Cochran, Dickson & Smith*, for the respondent.

(1) The chattel deed of trust in this case is valid in law. While it provides that the mortgagor shall have the right to retain possession of the property before

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conditions broken, and sell in the usual course of trade, it requires the net proceeds of all property sold to be paid over to the mortgagees in satisfaction of their indebtedness. *Metzner v. Graham*, 57 Mo. 404; *Hubbell v. Allen*, 90 Mo. 576; *Hughes v. Cory*, 20 Iowa, 404; Jones on Chat. Mort., sec. 425. The rule in *Hughes v. Cory*, *supra*, is the general rule in Iowa, Kansas, Kentucky, Maine, Massachusetts, New Hampshire and South Carolina. See cases cited, Jones on Chat. Mort. [3 Ed.] note to secs. 388, 389, 390, 391, 393, 399 and 405. (2) The doctrine in seventeen states and territories (including Missouri) is that possession of mortgaged goods with power of disposal does not make the transaction fraudulent *per se*, but at most is only *prima facie* evidence of fraud, which is a question of fact for the jury under all the evidence and the circumstances of the case. Jones on Chat. Mort. [3 Ed.] secs. 415 and 397; *Bank v. Bates*, 7 Sup. Ct. R. [Sup. Ct. U. S.] 681; *Henson v. Tootle*, 72 Mo. 632. In the present case the finding of the court was in favor of the garnishee, and hence is conclusive as to the absence of such fraud in fact as will avoid the deed. *Petring v. Chrisler*, 90 Mo. 654. (3) Where the mortgagee or his trustee in good faith takes possession of the property mortgaged prior to the levy of an attachment or service of garnishment, for the purpose of securing payment of his debt, and continues to hold possession up to the time of levy, he will be protected as against subsequent attaching creditors, even though the mortgage contains stipulations which render it void except as between the parties. *Dobyns v. Meyer*, 95 Mo, 132; *Petring v. Chrisler*, 90 Mo. 654; *Greeley v. Reading*, 74 Mo. 309; *Nash v. Norment*, 5 Mo. App. 545; *Cameron v. Marin*, 26 Kas. 612; Jones, Chat. Mort., sec. 178. (4) The debt of the Continental Bank was originally incurred by W. H. Webster & Co., the immediate predecessor of the corporation known as the Webster Glass and Queensware Company. This corporation succeeded to all of the assets of the firm, and

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in law became responsible for all its liabilities. 2 Morawetz on Corp. [2 Ed.] sec. 791, and cases cited; *Booth v. Bunce*, 33 N. Y. 139. (5) Declarations of law in a case tried by a court without a jury are of but little use, except to show the theory on which the case was tried. *Cooper v. Ord*, 60 Mo. 420; *Schureman v. Railroad*, 5 Mo. App. 570; *Stone v. Pennock*, 34 Mo. App. 544, "Courts refuse to reverse judgments because of errors in giving or refusing instructions where they can see from the whole record that substantial justice has been done. 2 Thompson on Trials, sec. 2403; *Williamson v. Drew*, 9 Mo. App. 598.

ROMBAUER, P. J., delivered the opinion of the court.

This is a proceeding upon garnishment. The plaintiff, a creditor of the defendant company, caused Stephenson to be summoned as a garnishee, March 14, 1885; but upon the trial of the issues between himself and the garnishee, judgment was rendered in favor of the garnishee, whence this appeal. The issues between the plaintiff and garnishee are made up by denial and reply in the following manner: The denial states that at the date of the service of the garnishment the garnishee had in his possession and custody and charge a large stock of merchandise, consisting of glass, china and queensware, office furniture and fixtures, and an iron safe, belonging to the defendant. The denial further states, that since the service of the garnishment and prior to the filing of the answer, the garnishee became indebted to the defendant in the sum of twenty thousand dollars, by reason of the sale of said property. The denial then proceeds to state that on July 24, 1884, the defendant, being then largely indebted to the plaintiff and others, executed a chattel deed of trust, conveying to one Bosbyshell, as trustee, the merchandise and chattels above stated, to secure the payment of two notes, bearing even date with the mortgage, and payable ninety days

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after date, one being to Branch for ten thousand dollars and the other to the Continental Bank for forty-five hundred dollars. That the said deed of trust contained the following stipulations:

"The said Webster Glass and Queensware Company shall have the right to retain possession of the property described in this deed before the conditions specified herein are broken, and shall have full power and authority to sell the same in the ordinary course of trade, provided, however, that, from the time of the execution and delivery of this deed, the net proceeds of all the goods, wares and merchandise, so sold by this company, shall be by this company paid over to the said Joseph W. Branch and the Continental Bank of St. Louis, the owners and holders of the notes above specified, until the said notes and interest thereon are fully paid and satisfied.

"It is also stipulated and agreed to by and between the parties hereto that in case of seizure of any of the property described in this chattel deed of trust under a writ of execution, attachment, replevy or other process, that the notes secured by this chattel deed of trust shall at once become due and payable, and the said party of the second part shall thereupon be entitled to take immediate possession of all the property mentioned and described in this chattel deed of trust, and may thereupon proceed to sell the same either at public or private sale, at wholesale or retail, and at such time or times and upon such terms as he may deem most advantageous for the interests of all parties concerned, for the purpose of paying and satisfying whatever may be found to be due on said notes as aforesaid."

The denial then charges that said deed of trust was void, being executed without authority of the corporation, and was executed and delivered as the result of a fraudulent conspiracy to hinder, delay and defraud the plaintiff and other creditors of the company; that it was further void because it appears upon its face to be

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in trust and to the use of the defendant company; that the notes to Branch and the Continental Bank were void as against the plaintiff, being given without any consideration received by the defendant company, who was not indebted to the payees in any sum whatever.

The garnishee's reply denied the allegations of plaintiff's denial. It further stated that the chattel deed of trust was made for the purpose, and no other, of securing the notes mentioned therein, which were given for the considerations therein expressed; that the deed was duly recorded the day succeeding its date; that Bosbyshell, the trustee, took possession under it after the notes matured, and, upon his refusal to act afterwards, the garnishee was appointed trustee, took possession, and was in possession when summoned; that thereafter and before filing his answer, he disposed of the property under the provisions of the deed of trust, for less than the amount of the notes secured, and accounted for the proceeds to the beneficiaries of the trust.

These being the issues, it will be seen that three questions were presented to the trial court for determination: *First.* Whether as a matter of law the chattel deed of trust was void or voidable against the creditors of the mortgagor, and incapable of validation by delivery of the property mortgaged, prior to its seizure upon the plaintiff's writ of attachment? *Second.* Whether the execution of the mortgage was unauthorized by the corporation, and thus ineffectual to create a lien upon its property? *Third.* Whether the mortgage was fraudulent in fact and as such void against the creditors of the corporation?

The plaintiff, appealing, maintains that all these questions should receive an affirmative answer, under the established facts, and that an affirmative answer to either demands a reversal of the judgment.

The last of these propositions depends for its solution on controverted facts. The plaintiff adduced

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evidence tending to show that, when the deed of trust was executed, the two beneficiaries knew that the mortgagor was in an insolvent condition, and knew or had reason to suppose that it was executed with an intent to force a compromise with other creditors of the company. The plaintiff also introduced evidence tending to show that the two beneficiaries knew, or had reason to know, that the notes secured were original debts of Webster, and mere renewals of his obligations, and not debts of the corporation, and that the execution of the deed of trust by Webster as president, securing these notes, was in fraud of the corporation and its creditors. On the other hand, the garnishee offered evidence tending to show, that the beneficiaries in good faith advanced the money, evidenced by these notes, believing that it was advanced to, and to be used for, the purposes of the corporation.

Upon the issues thus presented, the plaintiff asked seven instructions. Of these, the court gave six and refused one. It also refused two other instructions, which plaintiff asked on other points of the case. Without setting out these instructions in detail, it suffices to say, that they were more favorable to plaintiff than it had any right to demand. Some of them stated propositions of law so erroneously in plaintiff's favor that, if the court had found for plaintiff, we would have been bound to reverse the judgment, unless the deed is void as a matter of law. The garnishee in this case is a mere trustee for the beneficiaries, and was not even an original party to the deed. If the beneficiaries occupied the position of purchasers for value, it is evident that before their rights could be affected by any fraud in the execution of the deed, they must have been privies to such fraud by participation therein. That proposition is elementary. *Little v. Eddy*, 14 Mo. 160; *Forrester v. Moore*, 77 Mo. 651; *Craig v. Zimmermann*, 87 Mo. 475. If the law were as stated in some of the instructions

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given for plaintiff, it would have some reason to complain that the finding under the evidence was against the law; but as the law is otherwise that branch of the case presents nothing for review here.

The argument of plaintiff's counsel, if we understand it rightly, goes to this extent: That the assets of an insolvent corporation are a substitute for its capital stock; that the capital stock of a corporation is a trust fund for the payment of all its creditors; and that it is a logical sequence from these premises that such assets cannot be applied by the corporation for any other purpose than the ratable payment of existing creditors, and hence cannot be subjected by the corporation to a lien in favor of mortgagees for value. This entire argument rests on a total misconception of the law. One dealing in good faith with an insolvent, but live and active, corporation is as fully protected as if dealing with an individual, as long as the corporation acts within its charter powers. By the statute of this state, Revised Statutes, section 3937, a person who pays money to a trustee is not responsible for its proper application. It has been held by this court and others that even as to the capital stock of a corporation, which is under the unquestioned American rule a trust fund for all of its creditors, one, who buys in good faith shares fraudulently issued as full paid, is not chargeable with the unpaid portion of such shares by the creditors of the corporation (*Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Foreman v. Bigelow*, 4 Cliff. 508); and such holding has been approved by the supreme court. *Erskine v. Lowenstein*, 82 Mo. 301.

The deed of trust provides that the merchandise conveyed shall remain in possession of the mortgagor until condition broken, but also provides for the payment over of net proceeds of sale to the beneficiaries. The appellant contends that the case is distinguishable from *Metzner v. Graham*, 57 Mo. 404, and *Hubbell v. Allen*, 90 Mo. 576, because in those cases the mortgagor was to

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account to the mortgagee for the sales and use their proceeds to pay the indebtedness secured. The supreme court declared the mortgages in the above cases valid, and not contrary to the statute which prohibits conveyances to the grantor's use. We confess that the distinction between *Hubbell v. Allen*, and the present case, is rather shadowy, as the term net proceeds implies proceeds less expenses of sale. Regardless, however, of the attempted distinction, the question becomes immaterial in view of the conceded fact, that the trustee took possession of the property conveyed, prior to the goods being attached. In that respect the case is stronger against plaintiff than *Nash v. Norment*, 5 Mo. App. 545, cited and approved by the supreme court in *Greeley v. Reading*, 74 Mo. 309, and reaffirmed in *Dobyns v. Meyer*, 95 Mo. 132. In *Nash v. Norment*, *supra*, it was conceded that the deed was void upon its face, its provision making it one for the use of the grantor, and yet this court held it was validated by subsequent delivery of the property. We gave our reasons in *Dobyns v. Meyer*, 20 Mo. App. 66, why the rule should be otherwise, and certified the case to the supreme court, so that that court might frame a different rule on the subject. The subsequent adherence by that court to the rule stated in *Nash v. Norment* and *Greeley v. Reading*, precludes all further argument on this question.

The plaintiff claims that the evidence conclusively shows that the deed of trust was unauthorized by the corporation, and not the instrument of that body. It appeared in evidence that when the execution of the deed was determined upon, Webster was the sole stockholder of the corporation. As corporations sole are not known to our laws, and there was no board of directors capable of acting, the attorney for one of the proposed beneficiaries caused Webster to transfer one share of stock to each of two other parties. The three parties, being all the stockholders, then met and authorized the execution of the mortgage. It does not appear that

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either of these two outside shareholders were ever elected directors. The statute, section 735, Revised Statutes, provides that when all the members of a corporation shall be present at any meeting, however called or notified, and shall sign a written consent thereto on the record of such meeting, the acts of such meeting shall be as valid as if legally called and notified. As all this was done in the present instance, and as it cannot be questioned that all the members of the corporation can confer at least as much authority as its board of directors could, we cannot see the force of plaintiff's argument on this point.

The next point made by plaintiff is that, as one of the new stockholders was a clerk or employe of one of the beneficiaries, such beneficiary at once became chargeable with notice of the insolvency of the defendant corporation, and the purposes for which such mortgage was executed. In reply to this, it will suffice to say that it has been repeatedly decided in this state, that knowledge, which comes to a corporation officer through his own private transactions and beyond the range of his official duties, is not the knowledge of the corporation, and attaches to the latter no responsibility by way of notice. *Bank v. Shaumburg*, 38 Mo. 228; *State Savings Ass'n v. Printing Co.*, 25 Mo. App. 642, 650.

Complaint is made by the plaintiff that the court failed to file instructions given for the garnishee. It would seem from a recital in the transcript that the court determined to give some declarations of the law for the garnishee, but that they were mislaid and could not be found when the transcript was prepared. It suffices to say, in disposing of this complaint, that it is not preserved by motion for new trial, and for that reason, if for no other, not subject to review here. Even if preserved by motion for new trial, we could not assume that the instructions thus given were erroneous, still less could we do so when the instructions given on behalf of

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the plaintiff show that they are more favorable to plaintiff than he had any right to demand. Instructions 1 and 8, asked by plaintiff and refused, were on the subject of the mortgage being void upon its face, and of notice to the beneficiary corporation by implied notice to its clerk. Both have been disposed of by what has been hereinabove stated. Instruction 5, also refused, is a mere comment on the evidence, argumentative, and touching an immaterial issue. It might have been properly refused on either of these grounds.

The only additional error complained of is that the allowance to the garnishee was excessive. On what was a proper allowance, the court, as the transcript shows, heard evidence which is not preserved in the record. There is nothing before us on which we can review that finding.

It results that the judgment must be affirmed, and, all the judges concurring, it is so ordered.

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W. N. Wilkerson *et al.*, Appellants, v. Thomas A. Bruce, Respondent.

St. Louis Court of Appeals, May 28, 1889.

1. **Accord and Satisfaction**: PLEADING. A plea of accord and satisfaction, which fails to state that the matter relied upon as an accord was accepted as a satisfaction by the creditor suing, is bad on demurrer, but good after a verdict sustaining it.

2. ——— : EVIDENCE. There must be evidence of such an acceptance; and a written transfer of a policy of insurance purporting to be for the benefit, *pro rata*, of specified creditors, if only accompanied by the debtor's testimony that he understood that it was to be a satisfaction of the claims of such creditors, does not constitute such evidence.

3. **Practice, Trial**; MOTION IN ARREST OF JUDGMENT. The allegation in such a motion, that "on the whole record plaintiffs should have recovered," presents no ground for complaint, when under the pleadings in the cause the burden of proof is upon the plaintiffs.

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Appeal from the Pemiscot County Circuit Court — HON. H. C. O'BRYAN, Judge.

REVERSED AND REMANDED.

C. P. and *J. D. Johnson*, for the appellants.

(1) Defendant's plea of "satisfaction and payment" was intended doubtless to be a plea of accord and satisfaction, but does not amount to such inasmuch as it fails to allege plaintiffs agreed to accept the assignment of the policy in satisfaction of their claim. 2 Parsons Cont. [6 Ed.] 681; *Shaw v. Burton*, 5 Mo. 478. Or, if it is to be taken as a plea of payment, it is insufficient in not alleging that the assignment was received by plaintiffs in payment of their claim. *German v. Mulhall*, 8 Mo. App. 558. Hence, plaintiffs' motion in arrest of judgment should have been sustained. (2) The verdict is contrary to the evidence as well as to the weight of the evidence. There is no evidence that the plaintiffs contracted to accept the assignment of the policy in satisfaction or payment of their claim. The only evidence on the point is the testimony of the defendant to the effect that he understood that the assignment was made in payment of his indebtedness; but this is not evidence of an agreement; and, besides, the assignment, which should have embodied the agreement, if any had been made, is silent upon the question, and contains conditions which are inconsistent with any such understanding. The principle involved is analogous to that involved in cases where notes have been given for debts, and in which it has been uniformly held that a note will not operate as a payment unless there is a positive agreement to that effect, and unless the note is given and accepted as a payment. *Appleton v. Kennon*, 19 Mo. 637; *Commiskey v. McPike*, 20 Mo. App. 82; *Howard v. Jones*, 33 Mo. 583; *Bank v. Payne*, 31 Mo. App. 512; *Block v. Dorman*, 51 Mo, 31; *Wiles*

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v. Robinson, 80 Mo. 47; *Holmes v. Lykins*, 50 Mo. 399. When a verdict is absolutely without proof to sustain it, or is not supported by substantial evidence, as in this case, a new trial should be granted. *Spooner v. Hannibal*, 23 Mo. App. 403; *Wright v. Missouri*, 20 Mo. App. 481; *St. Louis v. Bodemann*, 12 Mo. App. 573; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Ficher v. Merchants*, 13 Mo. App. 133; *Hipsley v. Kansas*, 88 Mo. 348; *Hunt v. Missouri*, 89 Mo. 607; *Ellis v. Bray*, 79 Mo. 227; *Whitsett v. Ransom*, 79 Mo. 258; *Schenck v. Sautter*, 73 Mo. 48; *Schneiding v. Ewing*, 57 Mo. 78; *Cary v. St. Louis*, 60 Mo. 209; *Dedo v. White*, 50 Mo. 241; *Ackley v. Staehlin*, 56 Mo. 559.

R. B. Oliver, for the respondent.

The only question presented by this record is as to whether or not appellants accepted, and respondent made, the assignment of the policy in full satisfaction of appellants' demand. That question was fairly and clearly put to the jury by the instruction given by the court on behalf of respondent, and was by the jury found for the defendant. Where there is any testimony on an issue made, and that issue is fairly put to the jury this court will not disturb the finding of the jury.

THOMPSON, J., delivered the opinion of the court.

This is an action to recover a balance alleged to be due on a merchant's account. The answer is a general denial, and also a plea of payment, in the following language:

"For further answer defendant says that in 1884 he assigned to this plaintiff and three other creditors a policy of insurance in full satisfaction and payment of this demand against him. Wherefore he again prays for judgment." There was a reply, denying the new matter in the answer. There was a trial before a jury, and the defendant had a verdict and judgment. The plaintiffs, appealing, assign for error:

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I. That the averment in the answer, above set out, does not amount to a plea of payment or of accord and satisfaction. We think that this paragraph of the answer would have been bad on demurrer. The form given in the appendix to the Revised Statutes for an answer setting up an accord and satisfaction recites that the defendant "delivered to the plaintiff one wagon, *which he received* in full satisfaction of the note mentioned in the petition." And the law clearly is that it is necessary to aver that the thing delivered was *received* or *accepted* in satisfaction of the debt. *Shaw v. Burton*, 5 Mo. 478, 480; *German Bank v. Mulhall*, 8 Mo. App. 558. But this defect is challenged only by a motion in arrest of judgment, setting forth that "on the whole record plaintiffs should have recovered." The verdict is a part of the record, and this paragraph of the answer, though bad on demurrer, was certainly cured by the verdict. Besides, the motion in arrest was drawn in such general language that it did not necessarily apprise the court or the opposite counsel that this part of the answer was challenged; and as it did not necessarily raise the question in the trial court, we ought not to consider it here. Moreover, the motion was otherwise clearly not well taken; because, leaving out of view the question of the sufficiency of the plea of payment, the existence of the debt sued for was not admitted, but was denied by the answer; the burden of proof was on the plaintiffs, and the court could not have rendered judgment for the debt on the pleadings, especially after a verdict for the defendant.

II. The second assignment of error is that there was no evidence to support the affirmative defense thus set up. A majority of the court are of opinion that this assignment of errors is well taken. It appeared in evidence that the defendant assigned to Hunsdon Cary, for the benefit of several of his creditors, a policy of insurance under which a loss had occurred, which assignment, endorsed on the policy, was as follows: "For value

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received, I, T. A. Bruce, the insured in the within, do hereby assign, transfer and convey the within policy, which has become a claim by fire to the amount of $2262.48, unto Hunsdon Cary, of Memphis, Tennessee, as trustee for the benefit of the following parties, to whom I am indebted, to-wit:

Schoolfield, Hannauer & Co., debt......	$1401.96
W. N. Wilkerson & Co., debt..	452.06
Anderson Hat Co., debt...............	190.00

Mrs. M. K. Sims, for such sum as I may owe to her on a settlement of accounts between us, which accounts have been kept with T. B. Sims & Co. When this policy is collected the proceeds shall be divided *pro rata* among the above parties after payment of expenses of collection. Mr. Cary has authority to make any compromise of this policy which may be approved by the above creditors."

It is to be observed that this assignment does not on its face purport to be made in payment or in satisfaction of the debts therein recited. The law does not, of course, imply that it was made in payment or satisfaction. Any principle, that would raise such an implication from the terms of this assignment, would make every assignment for the benefit of creditors a satisfaction of the debts due to the creditors for whose benefit it was made, and would convert every such assignment into an assignment in bankruptcy with a discharge of the debtor. The most that can be said in favor of this assignment is that it presents a latent ambiguity on the point of contention whether it was intended to be satisfaction or merely collateral security, which ambiguity is explainable by parol evidence.

But there was no parol evidence showing that it was *accepted* as payment by the parties for whose benefit it was made. If such was the agreement, the defendant himself, who personally made the assignment, must

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have been able to state the fact. But he does not state it. His testimony is as follows:

"Question. What did you do with your insurance policy upon said destroyed property?

"Answer. I carried it down to Memphis and turned it over to a lawyer, or assigned it to him, for the benefit of certain creditors, of whom plaintiffs were one. Schoolfield, Hannauer & Co., Anderson Hat Co. and Mrs. M. K. Sims were the others.

"Question. Did you make that transfer in full payment of your indebtedness to the said creditors?

"Answer. That was my understanding.

"Question. Did said creditors accept the said policy in full payment of their said indebtedness?

"Answer. I think so, sir."

CROSS-EXAMINED.

"Question. Did you get a written release from the plaintiffs and your other preferred creditors?

"Answer. No, sir.

"Question. Did you ever get a receipt or any other writing from them?

"Answer. No, sir.

"Question. Did you ever ask for any?

"Answer. No, sir, I didn't.

"Question. Did you at the time, or since that time, demand a receipt from your said creditors, or that their book accounts be balanced, in your favor?

"Answer. No, sir.

"Question. You say that it was your understanding that the assignment was made by you in full payment of your said debts?

"Answer. That was my understanding. I thought at the time the insurance policy would pay the debts to the creditors, and I would get something out of it myself, that is over and above their indebtedness against me."

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The questions and answers, when analyzed, amount to this, and nothing more: *First.* That it was the witness' "*understanding*" that *he made* the transfer in full payment of his indebtedness to the creditors therein mentioned. *Second.* That *he thinks* that the creditors *accepted* the policy in full payment of their indebtedness. *Third.* That he got no writing of any sort evidencing that fact. *Fourth.* That *he thought*, at the time when he made the transfer, that the policy would pay the creditors, and that he would get something out of it himself, over and above their indebtedness against him.

The very most that can be said in favor of the above is that it is only evidence of what the defendant *understood* and of what he *thinks*, and *thought*. But the understanding of *one party* does not make a contract, nor an accord and satisfaction. Nor does what a witness thinks rise to the dignity of evidence, where the fact, if it be a fact, is within his own knowledge, and susceptible of being proved by a positive statement.

Nor is the failure of evidence, on the part of the defendant on this issue of payment, helped out by any *corroborative evidence.* Corroborative evidence implies, from its very nature, that there must be substantial evidence to corroborate. But the fact appealed to as a corroboration, that the assignment gave the trustee, with the approval of the creditors, the power to compromise the claim with the insurance company, is not necessarily so; for it may be said that, if the assignment had been made in payment, that would not have been necessary; for, they being the owners of the claim, that would have been their legal right.

But, aside from all this, the defendant's own evidence, which if it were doubtful must be construed as a whole and most strongly against himself, shows an understanding on his part which is quite incompatible with the idea of payment or accord and satisfaction; he was to get the surplus, if any, after the debts were

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paid. This shows that he did not understand that he was parting with his full beneficial interest in the policy;—a thing which necessarily takes place where a chattel or chose in action is transferred in payment or in satisfaction. We therefore take it that the defendant offered no substantial evidence in support of this defense, but showed by his own evidence that it was not true. It is to be added that if this transaction meant payment or satisfaction, it would have been the easiest and simplest thing in the world to say so in the instrument of assignment.

The judgment will be reversed and the cause remanded. Judge ROMBAUER concurs. Judge BIGGS dissents.

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HESTER JONES *et al.*, Respondents, v. MINA ROBERTS *et al.*, Appellants.

St. Louis Court of Appeals, May 28, 1889.

1. **Will: BURDEN OF PROOF.** In an action in which the validity of a will is contested, the burden of proof as to the sanity of the testator is upon the party upholding the will.

2. ——: ——. When in such an action undue influence in procuring the execution of the will is charged, the burden of proof on this issue is upon the contestant; but if a confidential relation between the testator and legatee is established a presumption of the exertion of undue influence by the latter arises, and the burden of proof shifts to him.

3. **Practice, Trial: INSTRUCTIONS.** An instruction that the defendant is required to establish a matter, as to which the burden of proof rests upon him, by competent evidence, is misleading and erroneous; it is the province of the court to declare what evidence is competent.

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4. **Practice, Trial:** EXAMINATION OF WITNESSES. A witness may be cross-examined upon any issue on trial, without becoming the witness of the cross-examiner as to matters in regard to which he was not examined on his direct examination.

5. **Practice, Trial:** INSTRUCTIONS. A demurrer to the evidence on any one of several issues on trial is not proper practice; a direct instruction, declaring that the evidence is insufficient, should be asked.

6. ——: ——. An instruction, that "by undue influence is meant the substitution of the intention of another for that of the testator," is too general and therefore erroneous.

7. **Wills:** EVIDENCE. Declarations of the testator before and after the making of a will are competent evidence on the question of his testamentary capacity, but not on an issue as to undue influence in procuring the execution of the will.

8. ——: UNDUE INFLUENCE. The exertion of influence by means of an appeal to gratitude for past services, or to pity because of the needy circumstances or condition of a party, or by means of reasonable and proper argument, is legitimate.

Appeal from the Pike County Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

W. H. Morrow and *D. A. Ball*, for the appellants.

(1) The burden of proof which the law imposes upon the proponents of a will in order to establish a *prima facie* case extends no further than to the making of the will, its attestation according to statutory requirements, and proof of the sanity of the testator by the attesting witnesses. *Harris v. Hays*, 53 Mo. 96; *Rankin v. Rankin*, 61 Mo. 295; 1 Jarmin, Wills, pp. 104, 5 and 7; Bailey's Onus Probandi, 151 and 389; *Jackson v. Hardin*, 83 Mo. 182. As to undue influence, the burden of showing that a will was procured by undue influence is upon the party alleging it. 1 Jarmin on Wills [5 Am. Ed.] p. 142, and authorities there cited. (2) George Hind as an attesting witness to the will, introduced by proponents for the purpose

of proving its execution and the sanity of testatrix, could not be examined by contestants on the issue of undue influence without making him their witness and conducting the examination accordingly. (3) The court should have sustained the demurrer to the evidence in reference to the exercise of undue influence on the testatrix by Sophia Fritz, and likewise the demurrer to the evidence to establish undue influence on the part of Mina and Frederick Roberts. (4) Instruction number 1, given for plaintiffs, is erroneous because it imposes the burden of proof as to all the issues involved, affirmative and negative, upon the defendants, and because it not only submits to the jury to determine whether the will is valid or not, without defining what constitutes a valid will, but because it leaves to the jury to say what evidence given in the case was competent. *Morgan v. Durfree*, 69 Mo. 480; *Estes v. Fry*, 22 Mo. App. 88; *Speak v. Ely*, 22 Mo. App. 123. (5) Instruction number 7, which defines "undue influence," is indefinite and misleading. The substitution of the intention of another for one's own intention may be entirely legitimate; in order to be unlawful it must be fraudulently or coercively substituted. 1 Jarmin on Wills, pp. 132 to 135; *Young v. Bidenbaugh*, 67 Mo. 574; *Sunderland v. Hood*, 13 Mo. App. 232. (6) The defendants' instruction number 1, which was refused, correctly announces the law as to the declarations of the testatrix. *Bush v. Bush*, 87 Mo. 480; *Rule v. Maupin*, 84 Mo. 587; *Spoonmore v. Cables*, 66 Mo. 579; *Gibson v. Gibson*, 24 Mo. 227; *Tingley v. Cowgill*, 48 Mo. 291; *Hesster v. Hesster*, 16 Atl. Rep. [Pa.] 342; 1 Jarmin on Wills, p. 135; *Pemberton v. Pemberton*, 7 Atl. Rep. 642. (7) Defendants' instruction number 2 should have been given, as succinctly and properly defining the meaning of undue influence. 1 Jarmin on Wills [5 Am. Ed.] pp. 132 to 135; *Jackson v. Hardin*, 83 Mo. 175; *Sunderland v. Hood*, 84 Mo. 293; *Ketchum v. Stearns*, 8 Mo. App. 70. (8) And defendants' instruction

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number 6 correctly declares the law in reference to such influences as are not legally reprehensible, and was properly adjusted to the facts of this case. 1 Jarmin on Wills [5 Am. Ed.] p. 132; *Brinkman v. Bruggesick*, 71 Mo. 553; *Hall v. Hall*, 1 Prob. & Div. Law Rep. 481; *McCulloch v. Campbell*, 5 S. W. Rep. 590.

Reynolds & Lewis, for the respondents.

The court did not commit error in holding the *onus* to be upon the defendant to establish the instrument as the will of the testatrix—that is, that it was duly executed according to law, and that the testatrix was of sound mind and disposing memory when it was executed. *Tingley v. Cowgill*, 48 Mo. 291. (2) The court did not commit error in permitting respondent to cross-examine George Hind, or any other witness introduced by appellant on the issues involved in the whole case. *Railroad v. Silver*, 56 Mo. 265. (3) It was for the jury, under all the attendant facts and circumstances, to say what influence, if any, Mrs. Fritz exerted, and a demurrer to the evidence was properly overruled. The same is true in regard to the influence exerted by Mr. and Mrs. Roberts. It was for the jury to say, under all the facts and circumstances, and that there was such evidence is disclosed by the testimony of Mrs. Gardner and that of Mrs. Roberts herself. The appellant is evidently mistaken as to the scope of instruction number 1 (R., p. 179), when he says "it imposes the burden of proof of all the issues involved, affirmative and negative, upon defendants." It is quite plain that the instructions given in behalf of the respondents presented every issue in the case, and, taken as a whole, are all the instructions necessary in the case, and cover the issues raised by the pleadings and evidence on both sides, and the court would have been fully justified in refusing to give any others.

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THOMPSON, J., delivered the opinion of the court.

This was a petition under section 3980, Revised Statutes, to contest the validity of a will which had been admitted to probate by the probate court of Pike county. The will was that of Charlotte Bennett, who died on the twenty-fifth of December, 1884, about sixty-five years of age, leaving no bodily issue. The will was executed on December 1, 1884, and was admitted to probate on January 1, 1885. The contestants are the nephews and nieces of the alleged testatrix, children of certain of her brothers, who died prior to her decease. The defendants are legatees under the will,—the principal defendants being Mina Roberts and Frederick Roberts, her husband, who are jointly made the residuary legatees in the will. The petition challenges the validity of the will on three grounds:—

First. Because, at the time of the execution of said instrument and for a long time previous thereto, the said Charlotte Bennett was old and infirm, and her mind had been so greatly weakened and impaired by old age, domestic trouble and disease, that she was incapable of making an intelligent disposition of her property, and had not sufficient mind to comprehend and understand the nature and consequences of said will or the disposition of her property attempted to be made therein.

Second. Because the said Charlotte Bennett was induced to execute said pretended will on account of threats, coercion and undue influence on the part of the defendants, Mina Roberts and Frederick Roberts, her husband.

Third. Because the said Charlotte was induced to execute said pretended will on account of an undue influence exercised over her by the defendant Sophia Fritz.

The answer consisted of a special traverse of each of these grounds. There was a trial before a jury, and a

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verdict and judgment in favor of the plaintiffs, setting aside the will.

The evidence adduced at the trial tended to show that the maiden name of Charlotte Bennett was Hicks; that her family resided in West Virginia; that when she was about sixteen years of age she married one Jacob Linder, and that in 1839, she came with him to Louisiana, Missouri, where she resided until the time of her death. Her husband, Jacob Linder, died about 1870, and she continued to carry on a small notion store, which they were conducting at the time of his death, and continued to reside in the back and upper room of the store building until her death. Four or five years prior to her death she married one Dr. Bennett, but was shortly after divorced from him upon his petition. Dr. Bennett had let her have five hundred dollars to make a part payment of a debt due by her to Sophia Fritz, which was secured by a mortgage on her real estate. After the divorce, Dr. Bennett brought an action against Mrs. Bennett to recover this sum and interest, and this action was pending at the time of her death. After her divorce from Dr. Bennett she continued to live entirely alone, carrying on the little store and residing in the back room and also in the upper room of the house in which the store was carried on. While so residing she became subject to the hallucination that Dr. Bennett was trying to poison her, and in order to prevent him from poisoning her well, she had a house built over it. Her family relatives continued to live in West Virginia, except such as had removed to other parts of the country. A total cessation of intercourse had taken place between them; for thirty years no communication had passed between them; and they did not learn of her death until a year after it had occurred. Indeed, she never spoke of her relatives to her most intimate friends, and they did not know that she had relatives living. She had made a will, bequeathing all of her property to the Christian church of Louisiana, Missouri,

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in consideration of the church caring for her during such portion of her life as she might be unable to care for herself. This will was in existence in August, 1884, when she was stricken with partial paralysis. She recovered from this stroke sufficiently to get about the store with the aid of a cane, and to look after her business as she had done before. She was, however, unable to take care of herself and to attend to her housekeeping, and she received attention and help from the ladies of the church; but, whether justly or unjustly, she conceived that the church was neglecting her, and of her own motion destroyed the will which she had made to them. She then employed help, not keeping any one very long. Finally she seems to have tired of depending upon hired help, and made an arrangement with the defendant Mrs. Roberts to come and stay with her. She and Mrs. Roberts had known each other for many years, and were intimate friends. Mrs. Roberts stayed with her at first for a couple of weeks, until the services of a hired attendant were secured. This attendant left some time in November, the month before that in which Mrs. Bennett died, and Mrs. Roberts again came to wait upon her and take care of her. The latter part of November, Mrs. Bennett was again stricken with paralysis, and was not thereafter able to leave her bed until her death. She was a very large woman, and Mrs. Roberts, being unable to handle her alone, called in the aid of her husband, and they attended to her faithfully, kindly and attentively, as the evidence tends to show, until she died. This latter stroke of paralysis was so severe as to paralyze the entire right side of Mrs. Bennett, and so impaired her speech that only those who were accustomed to be with her could understand her. Indeed, she seems to have communicated for the most part by making signs.

In this condition Mrs. Bennett sent for the lawyer, who was her counsel in her litigation with Dr. Bennett, for the purpose of having him make her will. A

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description of the scene at the bedside, when the will was drawn and signed, was of a nature strongly to impress one with the belief that Mrs. Bennett had passed the period at which she was capable of making a will. Aside from the hallucination which she had conceived, that Dr. Bennett, her late husband, was trying to poison her, there was some evidence—we will not observe upon its credibility—to the effect that she had formed the same conception in regard to members of the church. One old friend, formerly her family physician, had called to visit her with his wife; and she, on his coming in, broke out into a sudden fit of laughter, threw up one of her hands and said: "Help me up; I want to stand up long enough to get married to brother Keith." This was previous to the second stroke of paralysis. The medical testimony tends to show that the seat of the paralysis was in her brain; and that she was not only peculiar, but also somewhat imbecile, prior to the last stroke. When the alleged will was made Mrs. Bennett lay in bed, her entire right side paralyzed, and, as the testimony of the subscribing witnesses tends to show, unable to communicate except by signs. The lawyer who drew the will would write a sentence and read it over to her, desiring to know if it was right, and she would indicate by signs whether it was right or wrong, and, if it was not right, have it erased and corrected. One of the subscribing witnesses testified as follows: "Q. All the instructions she could give was by signs? A. But she could use her left hand. She could make a sign, but I could not understand it. Q. Was her tongue paralyzed? A. Apparently so. Q. Where were you sitting? A. At the foot of her bed. Q. Where you could hear her? A. Yes, sir. Q. But you could not understand what she meant? A. No, sir. Q. How close were you to her? A. Just the length of the bed; about six feet. * * * Q. You could not understand anything she said? A. No, sir; I could understand her motions as well as the others, but

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her speech I could not understand. She motioned to Captain Morrow [the draughtsman of the will] to stop, and he would read, and she would indicate it was not right, and he spoke again, and she indicated it was right. Mrs. Roberts could understand most that she said. Mrs. Roberts would answer her, and Mrs. Linder [meaning Mrs. Bennett] would answer back. Q. In making the will none of you could understand her? A. I could not. Q. When there was any difficulty about it, Mrs. Roberts would talk to her? A. Yes, sir. Q. Mrs. Roberts would indicate to Mr. Morrow? A. No, sir; it was merely to get something for her that she talked at all. It was to get water or something. When Mr. Morrow read the will he spoke the words, and she nodded that it was correct. Q. How did Captain Morrow find out whom she wanted to give the property to? A. I suppose she had arranged that before. I could not tell by her actions. Q. Captain Morrow wrote it down, read it to her, and she nodded her head, and that was all she could do? A. Yes, sir." The witness could not tell how it was that Captain Morrow came to insert in the will that portion which made Mr. and Mrs. Roberts the residuary legatees. He supposed it was done in pursuance of some previous understanding. When Mrs. Bennett asked for water she made a motion with her lips. The other subscribing witness, Mr Lake, seems to have been able to understand the directions given by Mrs. Bennett when the will was drawn.

The signature to the will was not made by the hand of the testatrix, but by Dr. Dreyfus, her attending physician. Dr. Dreyfus could not even testify that she directed him to sign the will, though there was other testimony that she did. He testified as follows: "Q. Why did you do it? A. She could not write. She had very imperfect use of her right hand, and I was requested to sign for her. Q. Who requested you? A. I could not say positively as to that. I do not

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remember. I know it was agreed upon that I should sign the name, and I did so." The testimony of Dr. Dreyfus, of Captain Morrow, and of the subscribing witnesses, tended to show that, notwithstanding the extremely low physical condition of Mrs. Bennett, she retained sufficient strength of memory to make a will.

Upon the question of the *undue influence* of Mrs. Roberts and Mr. Roberts, there was no direct testimony, except that of one witness, Mrs. Gardner. The only circumstantial evidence in support of Mrs. Gardner's testimony which we glean from the record was the fact that Mrs. Roberts, with the assistance of her husband, was nursing Mrs. Bennett in what all of them, including Mrs. Bennett, understood to be her last illness. Although the evidence does not indicate that Mrs. Bennett was neglected by her other neighbors or by the ladies of the church, or would have been neglected if Mrs. Roberts and her husband had not been in attendance upon her,—yet the fact remains that they were her superiors in what the law on this subject regards as a confidential relation, the relation of patient and nurse upon a dying bed.

We find no substantial evidence to support the charge in the petition of any undue influence on the part of Sophia Fritz.

I. The first assignment of error relates to the rulings of the court upon the question of the *burden of proof*. Before any evidence was heard, the defendants stated that their understanding was that the formal attestation of the will was all they had to prove. The court ruled that this was not sufficient, but that the general burden of proof was on the defendant. To this ruling the defendants excepted. Beyond question, so far as the issue of sanity was concerned, the burden of proof was upon the defendants. In the case of *Elliott v. Welby*, 13 Mo. App. 19, 28, which was a case of this kind, this court said: "In the present case, according to the established rule in this state, the burden of proof

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throughout rested upon the defendants, who were endeavoring to establish the will. The plaintiffs did not admit that the alleged testator was of sound and disposing mind, but expressly denied this in their petition. It was a point in issue, to be established by the defendants who propounded the will, and the burden was not shifted by the introduction of the sworn attestation to the will before the clerk of the probate court at the time it was proved there. * * * If the general presumption of sanity is to be said to exist at all in respect to wills, such a presumption, that men are sane, may stand instead of proof, and to make out a *prima facie* case; but it does not change the burden of proof. The party whose case requires proof of the fact has the burden of proof." In this case, this court followed the ruling of the supreme court in *Benoist v. Murrin*, 58 Mo. 307, 322, where it was said: "This question was thoroughly considered in *Delafied v. Parish* (25 N. Y. 9), and, as the result of the authorities, it was held, that in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased; and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory; and that this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will and testamentary competency, by the attesting witness, but remains with the party setting up the will." The court, therefore, was correct in the ruling complained of, so far as the issue of *sanity* was concerned.

II. As to the issue of *undue influence*, the record presents a different question. When the defendants had presented their evidence, showing the execution of the will and supporting their contention that the alleged testatrix was possessed of testamentary capacity when she made the will, they rested. The plaintiffs then went forward with their testimony and presented testimony

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tending to rebut the testimony of the defendants to the effect that the alleged testatrix was possessed of testamentary capacity when she made the will; and they also presented evidence tending to show that the will was made under undue influence exerted upon the alleged testatrix by Mrs. Roberts. The court refused to instruct the jury, at the request of the defendants, that "undue influence is not to be presumed, but must be proved as any other fact, by satisfactory evidence given in the case." But the court, on the contrary, instructed the jury that the general burden of proof was on the defendants, in the following language: "The jury is instructed in this case that the burden of proof is on the defendants; that is, defendants are required to establish, by competent evidence, to the satisfaction of the jury, that the paper read in evidence purporting to be the will of Charlotte Bennett is the valid will of Charlotte Bennett." This was tantamount to declaring that the burden of proof in respect of both of the issues was on the defendants. This we think was error. It is said in a very learned work on the law of administration, just published: "Influence is never presumed (except in the case to be considered below, between attorney and client, or where the legatee sustained a fiduciary relation to the testator), but must always be proved by the party alleging it." Woerner Am. Adm., sec. 31. "The rule that undue influence may never be presumed, but must be proved by the person who alleges it, is subject to an exception in those cases in which a legacy is given by a testator to his attorney, confidential adviser, guardian, or other person sustaining toward him any fiduciary relation." *Ib.*, sec. 32. The learned author supports these two propositions by the citation of numerous cases. It must follow that in every case where a will is contested on the ground of undue influence, and it is not admitted by the pleadings that the legatee occupied toward the alleged testator the superior position in a confidential relation, the *initial burden of proof* rests

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upon the contestant, at least so far as to show that the proponent of the will did occupy such a relation to the alleged testator. When this fact is admitted or shown, then a presumption arises against the validity of the will, and the burden is cast upon the proponent of the will of overcoming this presumption. *Street v. Goss*, 62 Mo. 226; *Bradshaw v. Yates*, 67 Mo. 221, 228; *Caspari v. First German Church*, 12 Mo. App. 293, 314, and numerous cases cited.

In this case, it was not alleged in the petition that Mr. and Mrs. Roberts, or Sophia Fritz, occupied any confidential relation towards Mrs. Bennett. The naked charge was that the execution of the will was procured by undue influence exerted upon Mrs. Bennett by these persons. The burden of proving this fact, at least so far as showing a confidential relation and bringing the cases within the rule which would change the burden of proof, rested upon the plaintiffs. The declaration of the court *at the outset*, that the entire burden of proof rested upon the plaintiffs, seems not to have been harmful, because it had no other influence than to control the order of proof, and this, as we have seen, proceeded in the natural way. So, the refusal of the court to instruct the jury that on the issue of undue influence the burden was upon the plaintiff, and the action of the court in giving without qualification the instruction that the burden was upon the defendants, seems equally harmless; because the existence of the confidential relation between the alleged testatrix and Mrs. Roberts and her husband was indisputably established, so that the effect of these rulings was merely an assumption of the existence of an established fact, which in itself had the effect of shifting the burden of proof.

III. The instruction in which the court thus announced to the jury the rule as to the burden of proof was erroneous, in that it submitted a question of law to the jury, to-wit, the competency of the evidence adduced to establish the will, by telling them that

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"Defendants are required to establish, by *competent evidence*, to the satisfaction of the jury, that the paper read in evidence, purporting to be the will of Charlotte Bennett, is the valid will of Charlotte Bennett." It was for the court to say what evidence was competent; and the jury were bound to regard all the evidence which had been admitted, and not withdrawn from their consideration by instructions, as competent evidence, to be weighed by them in determining the issues of fact submitted to them. The instruction was liable to mislead the jury, by leading them to believe that they had the power to determine what evidence submitted to them was competent, and hence to be considered by them, and what was not.

IV. We do not, however, go to the length of holding that the instruction was bad because of the word "valid" in its concluding clause in connection with the word "will." We do not think that this could fairly be regarded as submitting to the jury the question whether the will was valid in law. The question submitted to them was whether the paper was or was not the will of Mrs. Bennett, and this, at least in ordinary speech, was tantamount to submitting to them the question of the validity of the will. We think it would be too great a refinement to uphold the objection to the use of the word "valid" in this connection.

V. George Hind, an attesting witness to the will, was introduced by the proponents, for the purpose of proving the execution of the will and the sanity of the alleged testatrix. Error is assigned on the ruling of the court in allowing him to be *cross-examined* on the issue of undue influence without requiring the contestants first to call him as their own witness. We see no error in this ruling. Under our state practice, which in this respect follows the practice of the English courts, in contradistinction to the practice of the federal courts, a witness who is sworn to give some evidence, however

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slight and unimportant, may be cross-examined in relation to all matters involved in the case. *St. Louis, etc., R. Co. v. Silver*, 56 Mo. 265.

VI. The next assignment of error relates to instructions given and refused touching the clause of the petition which charges undue influence exerted upon Mrs. Bennett by Sophia Fritz. We have already said that we see no substantial evidence in the record supporting this allegation. In respect of this allegation, the defendants offered, among their instructions, one couched in the following language: "Defendants come and demur to so much of the evidence in this case as has been offered for the purpose of proving an undue influence over the testatrix in the making of her will by and on the part of Sophia Fritz." This instruction was refused. On the other hand, the court gave the following instruction on this point, requested by plaintiffs: "If the jury believe, from the evidence in the case, that the paper was executed by the said Charlotte Bennett, by reason of undue influence exercised over her by the defendant Sophia Fritz, and that said paper would not have been so executed but for such undue influence exercised over her by said defendant Sophia Fritz, then the jury must find that said paper is not a valid will."

We are unable to put the trial court in the wrong for refusing the instruction which demurred to so much of the evidence as related to this issue of undue influence exerted by Sophia Fritz, because it is not the practice in this state to demur to a part of the evidence, nor, in a strict sense, to demur to the evidence at all. Counsel no doubt intended to have the court direct the jury that there was no evidence to support this sub-issue. If so, counsel should have requested an instruction in apt words so directing the jury.

But we cannot say the same of the instruction above quoted, given at the request of the plaintiffs, because there was no substantial evidence tending to support the

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hypothesis of fact therein contained, that Sophia Fritz had exerted any undue influence over the alleged testatrix. Indeed, the only benefit which Sophia Fritz took under the will was "two canary birds, and a cage for each of said birds," given to her "as a special legacy." She does not appear to have had any special interest in having Mr. and Mrs. Roberts made residuary legatees; and, in short, this part of the plaintiffs' case fell to the ground for want of evidence.

VII. A similar demurrer to the evidence tending to show undue influence on the part of Mina Roberts and Frederick Roberts was interposed, couched in language similar to that above quoted. It was properly refused, for the reason above quoted, and for the additional reason that there was substantial evidence, direct and circumstantial, tending to support the charge of undue influence on the part of these legatees. The circumstance that this evidence consisted in the testimony of a single witness, whose statements of the declarations made by Mrs. Roberts to her were not corroborated, goes for nothing. The testimony of one witness to a point in issue, if it is distinct, explicit and relevant, will take the issue to the jury, no matter how many witnesses may testify to the contrary, and no matter what circumstances may exist tending to discredit the one witness.

Aside from this there was abundant evidence tending to show the existence of a *confidential relation* between Mrs. Roberts and Mrs. Bennett, in which the latter was helpless and dependent on the former, during the existence of which relation the will was made, and at a time when Mrs. Bennett, if indeed possessing testamentary capacity, was extremely feeble in mind,—subject to hallucinations that persons were endeavoring to poison her, and given to fits of laughing and crying. This state of facts was sufficient to raise a presumption against the validity of the will, under the rule of *Street v. Gross*, 62 Mo. 226, and other cases already cited. If

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an instruction advising the jury that, if they should believe that this confidential relation had been established, the presumption of law was against the validity of the will, and the burden of showing that it had been executed by Mrs. Bennett of her own free mind was thereupon shifted upon the defendant, had been tendered by the plaintiffs, it would have been the duty of the court to give it to the jury.

VIII. The arguments which are directed against the second, third, fourth and fifth instructions given by the court at the request of the plaintiffs, seem to us to be needless hypercriticism. We do not feel disposed to countenance refinements in dealing with instructions which are intended for the information of plain men in the jury box, who no doubt in many cases read them very loosely.

IX. But we cannot pass over the seventh instruction given by the court at the request of plaintiffs, which undertook to define undue influence as follows: "By undue influence is meant the substitution of the intention of another for that of the testator." This instruction is plainly vicious, in that it is couched in such general terms that it could be understood by the jury in different senses. The intention of another might become substituted for that of the testator, by merely changing the will or desire of the testator by reasonable and proper argument and persuasion, and this would not constitute undue influence. It has been said by this court: "To make out such a charge of undue influence, it must be shown that an influence was exercised over the mind of the testator which was really a moral coercion, and which constrained him to do that which he did not wish to do, but which, from fear, desire of peace, or some feeling other than affection, he was unable to resist." *Sunderland v. Hood*, 13 Mo. App. 238; s. c. affirmed, 84 Mo. 293. In another case this court defines undue influence in the following language: "Undue influence is that which compels a testator to do

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that which is against his will, through fear, through the desire of peace, or some coercive power, which he is unable to resist, and but for the exercise of which he would not have made the will as it was." *Ketchum v. Stearns*, 8 Mo. App. 70. Again, our supreme court has said: "The influence denounced by law must be such as amounts to over-persuasion, coercion of force, destroying the free agency and will-power of the testator. It must not be merely the influence of affection or attachment, nor the desire of gratifying the wishes of one beloved, respected and trusted by the testator." *Jackson v. Hardin*, 83 Mo. 185. These questions show that the above instruction was not drawn in apt language to convey to the minds of the jury a proper conception of that undue influence which in law will operate to set aside a will.

On the other hand, the following instruction, tendered by the defendants and refused by the court, seems to embody in substance the elements of the foregoing definitions of undue influence, and I therefore think that it ought to have been given: "The court further instructs the jury upon this point, that, in order to invalidate the will here in controversy, any influence that may have been exerted over said Charlotte Bennett, inducing her to make said will, must have been such, and it must be so shown by the evidence, as to overpower her volition to the extent of rendering it subservient to the will of the person so exerting it; or that they exerted their influence in the disposition of her property with such force as to destroy her free agency in reference thereto." But on this point Judge ROMBAUER does not agree with me,—he being of the opinion that this instruction, while not stating the law erroneously, would not, by reason of the generality of its language, have been likely to aid the jury, and that the trial court ought not, therefore, to be put in the wrong for refusing it.

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X. Evidence was given of certain *declarations* of Mrs. Bennett with reference to the making of her will, both before and after the making of it. These declarations were professedly put in evidence as bearing upon the question of the testamentary capacity of Mrs. Bennett, and as such they were undoubtedly competent. But the defendants had a right to have their effect limited by an appropriate instruction. Such an instruction was tendered in the following language, and refused: "The court instructs the jury that any and all of the declarations made by the deceased Charlotte Bennett, both before and after the execution of her said will, which were given in evidence in this case, should be wholly disregarded by them, as either tending to prove or disprove the fact, in this case, put in issue, as to whether or not she was induced to make the will in question, by reason of undue influence exerted over her by the defendants or either of them." This precise question was ruled upon by the supreme court in the case of *Bush v. Bush*, 87 Mo. 480, where it was held that, on the trial of an issue whether or not a will was made under undue influence, declarations of the alleged testator, made before and after its execution, are inadmissible as evidence of the facts mentioned in such declarations; but that such declarations are only admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections; and they are then received as external manifestations of his mental condition, and not as evidence of the truth of the facts referred to in the declarations. This rule originated in *Gibson v. Gibson*, 24 Mo. 227, where the question, when and under what circumstances the declarations of a testator may be received in evidence, was considered at length, and a rule established which has since been followed in this state. The rule briefly is that such declarations are admissible, not as evidence of the *facts* therein declared, but merely as evidence of the *state of feeling* of the testator at the time, and then only in

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cases where that is material. *Cawthorn v. Haynes*, 24 Mo. 236; *Tingley v. Cowgill*, 48 Mo. 291; *Spoonmore v. Cables*, 66 Mo. 579; *Rule v. Maupin*, 84 Mo. 587.

XI. The court refused the following instruction, requested by the defendants:

"And the jury are further instructed that persuasions, such as appeal to gratitude for past services, and pity on account of needy circumstances or condition of life, are legitimate and may fairly be pressed on the one making a will as inducements to the disposition of property by will; and even if it were shown, by the evidence in the case, that such influence was exercised over the deceased by Mrs. Roberts and Frederick Roberts or Sophia Fritz, whereby she was induced to make such disposition of her property as provided for in her said will, yet if the jury believe from the evidence that such influence was gained over the deceased by kindness and friendly attention to her, and that it was exercised solely as a persuasive inducement to the making of the said will and the disposition of her property, and not in such a way as to destroy her freedom of will to such an extent that she could not exercise it in accordance with her own judgment, and that she was not thereby constrained to make a will and to make such a disposition of her property as was against her actual will,—then such influence so exercised is not in contemplation of law undue influence and is insufficient to invalidate said will."

This instruction seems to involve a correct application of the law to a hypothesis of fact which was supported by substantial evidence. It was well calculated to advise a jury of plain men as to what kind of influence will, and what will not, avoid a will. We see no reason why it should not have been given.

XII. The defendants' instruction, which the court refused, advising the jury as to what constitutes a "sound mind and disposing memory," seems to have been well enough; but the principle was covered by instructions which the court gave.

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XIII. We do not think that the court erred in refusing the following instructions requested by the defendants:

"If the jury believe from the evidence in the case that the instrument of writing purporting to be the last will of Charlotte Bennett, deceased, was signed with her name by Dr. J. W. Dreyfus, by her direction and in her presence as her will, and was attested by Geo. Hind and H. W. Lake, in her presence as witnesses thereto, as her will, and they further believed said Hind and Lake to be credible witnesses to the facts testified to by them as to the soundness of the mind of the said deceased at the time of the execution by her of said will,—then the law presumes that said testatrix was of sound and disposing mind, and the burden of proof then rests upon the plaintiffs to overcome by satisfactory proof the presumption of the law that she was of sound mind at the time of making her will."

We think that this instruction is objectionable as being an argumentative instruction. Parties ought to make their argument to the jury through the lips of their counsel, and the giving of argumentative instructions from the bench ought not to be countenanced. This instruction is also vicious and well calculated to mislead the jury, in that it is so framed as to disturb the free exercise of their judgment by telling them that if they believe the facts testified to by certain witnesses, the law presumes certain results. Such instructions are calculated to mislead the jury into believing that they are to determine the facts according to some artificial rule which they but vaguely understand, and not according to their reason and experience applied to the evidence before them. The true office of presumptions of law is to determine the burden of proof and to prescribe the result at which the triers of the fact must arrive in the absence of evidence, and not as arguments to disturb the natural volition of jurors.

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XIV. We think that the court was also right in refusing the following instruction tendered by the defendants: "The court also instructs the jury that an insane delusion is not such a delusion as arises from a belief, even in itself unreasonable, predicated upon a state of facts that, in the nature of things, or under the circumstances of the case, could or might occur; but that an insane delusion is one that is based on a belief of something impossible in the nature of things or under the circumstances of the case of which it is predicated; and although Charlotte Bennett may have, without apparent reason, suspicioned (*sic*) her then husband, Dr. Bennett, of designing to poison her, still these suspicions—if suspicions they merely were—do not of themselves establish the fact of such unsoundness of mind as to incapacitate her from making a valid will;—and, under the circumstances of this cause, are unworthy of any credit as tending to prove that fact, if the jury should believe that they were not of such a character as to influence her in the making of her will and the disposition therein made of her property." This instruction is so plainly vicious as being a comment on the evidence and an invasion of the province of the jury, as not to require any discussion. If it had been given and if the trial had resulted in a verdict and judgment for the defendants, that judgment must have been reversed for the giving of it. The excessive zeal of counsel to carry the jury by getting the judge to argue the case for them, in the form of instructions, is a prolific source of reversals and new trials, which are so frequent as to be a reproach to the administration of justice.

For the errors pointed out the judgment will be reversed and the cause remanded. Judge ROMBAUER concurs on all the points except the ninth, as above stated. Judge BIGGS, having been of counsel, takes no part in the decision.

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IN THE MATTER OF FRANCIS G. DELANO.

St. Louis Court of Appeals, May 28, 1889.

1. **Habeas Corpus:** CUSTODY OF CHILD. The custody of a child should not be changed on *habeas corpus* during the pendency before another tribunal of a divorce suit which incidentally involves the question of such custody, and in contravention of the orders of such tribunal, unless it clearly appears that the child will sustain serious prejudice in its health or morals by remaining, even during the pendency of that suit, in the custody in which it is.

2. ——: ——. In a proceeding on *habeas corpus* the interest of the child is the paramount consideration, and, within the years of nurture, the custody of the mother is presumptively better for the child than that of the father.

Chester H. Krum, for the petitioner.

Dinning & Byrns, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding by *habeas corpus* in which Francis J. Delano seeks to recover from his wife, Catherine E. Delano, the custody of Francis G. Delano, a male child of their marriage, who is a little over three years of age. Mr. Delano is about thirty-five years of age, and Mrs. Delano perhaps younger. They were married in 1884. This boy was born February 10, 1886, and is the only child of their marriage. They lived together until July 3, 1888, when Mrs. Delano left their residence, which was then at a boarding house in St. Louis, and with the child went to the residence of her mother in Ironton, Missouri, as she had done in the summer of previous years. No intimation of her purpose to institute proceedings for a divorce against her husband was made to him at the time when she thus left him. On the twenty first of July he visited her at the residence of her mother at Ironton, and remained with her over Sunday. On the occasion of this visit she gave him no intimation of her purpose to institute such a proceeding against him. She gives as a reason for so doing that she had not made up her mind

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to do so. He made a second visit to her on or about the tenth of August, and was refused admittance to her mother's residence where she was. On his return to St. Louis he received a notice of a divorce proceeding, instituted by her against him in the circuit court of Iron county, on the ground of indignities. Such proceedings were had in the divorce case, which was heard before the Hon. JOHN L. THOMAS, judge of that circuit, that the petition was dismissed. A motion for new trial was, however, made, and was pending at the time of our hearing the evidence in this proceeding. Judge THOMAS refused, pending the proceeding for divorce, to change the custody of the child, but allowed Mr. Delano the privilege of visiting it and taking it out once a week.

No charge is made by either party against the fitness of the other to have the custody of the child, with this exception: The learned counsel for the petitioner has pressed upon us the argument, founded on some evidence which was heard, that the proceeding for divorce was entirely unjustifiable, and was taken under circumstances such as indicated that the mental characteristics of the mother, or her surroundings, or both, show that her custody of the child is not a suitable custody. On the other hand, it is shown that the mother is a lady who has always borne the highest character in the community in Iron county, where she was raised; that her mother is likewise a lady of good character, and that both she and her mother are in good circumstances. It appears, without controversy, that Mrs. Delano has considerable property, and that she enjoys an income of about fifty dollars a month. It further appears that her attention to the child has been most devoted and judicious, all that could be expected in the best of mothers. The evidence also shows that Mr. Delano is a young man thirty-five years of age, of good character, and in moderate circumstances, but no doubt able properly to care for and rear the child. At present he boards in St. Louis, together with his mother

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and sister. His mother is about seventy-five years of age, and somewhat feeble. His sister is a maiden lady, about forty years of age, who has taught in the public schools, who is shown by the evidence to have had considerable experience in the care of young children, and who, from the evidence, and also from her appearance and demeanor on the witness stand, we take to be a lady of culture, of excellent judgment and of the best character.

Under these circumstances we take it that it is our duty to leave the child in the custody of this mother. Our view is that, where a proceeding for divorce which incidentally involves the question of the custody of a child of the marriage is pending before a court of competent jurisdiction, the *interim* custody of the child should not be changed, in contravention of the orders of such court, by another court, on *habeas corpus*, unless it clearly appears to such other court that the child will sustain serious prejudice in its health or morals by remaining, even during the pendency of the divorce proceeding, in the custody where it is. The evidence in this case furnishes ground for no such fears, but, on the contrary, shows conclusively that the present custody of the child is a suitable and proper custody. While we were not impressed with so much of the evidence as was given before us in behalf of the respondent touching the grounds on which she was prosecuting this divorce proceeding, we think it proper to say that we declined to go into this subject fully, and we do not wish to be understood as expressing an opinion on the question whether Mrs. Delano was justifiable in instituting that proceeding, especially in view of the fact that it is still pending on a motion for new trial before the circuit court of Iron county. On the other hand, we were not impressed with the argument that the fact that Mrs. Delano left her husband's home, taking the child with her, without apprising him of her intention to institute a suit for divorce, and that she did not apprise him of such intention at the time of his first visit to her at the

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residence of her mother after she had thus left him, indicates an unfitness in her to have the custody of this child. The wife is under the dominion of her husband, —is to a great extent subject to him, legally, physically and morally. Deception is more or less the refuge of the weak and subject, and the employment of it does not, under all circumstances, imply a defect of moral character. If a wife, who finds her continued cohabitation with her husband intolerable, and who desires to quit his abode and take with her an infant child of marriage and to institute a divorce proceeding, apprises her husband of her purpose before doing so, she knows that she will be, by reason of that very fact, restrained from taking the child with her. And then as to the fact that Mrs. Delano did not inform her husband of her purpose at the time when he visited her on the twenty-first of July at her mother's residence in Iron county, we are justified in crediting the excuse which she offers, that at that time she had not fully made up her mind to commence the proceeding. In these painful cases much can generally be said on both sides; but in this case we are able to state that the evidence happily casts no imputation upon the character and good conduct of either of the spouses, and affords no reason why they should not hereafter resume their marital relations and live happily together.

But our duty under the law is clear. We should not exercise our jurisdiction to invade or displace that of the circuit court of Iron county, where the question of the custody of this child is still pending. Nor should we remove a child of the tender years of this one from the custody of its mother. It has become a settled principle in the jurisprudence both of England and America that the interest of the child in proceedings of this kind is the paramount consideration, and that, within the years of nurture, the custody of the mother is presumptively better for the child than that of the father. Nothing can measure the love of a mother for

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her tender offspring, and no other woman, however well qualified for such a task, can, in the care and rearing of a child of tender years, fill the place of a well-qualified mother.

The judgment of the court is that this infant, Francis G. Delano, be remanded to the custody of the respondent, Catherine E. Delano. All the judges concur.

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JAMES W. CALLAHAN *et al.*, Respondents, v. CHARLES H. MORSE *et al.*, Appellants.

St. Louis Court of Appeals, May 28, 1889.

1. **Practice, Appellate.** This court will not disturb a finding of facts made by a trial court, sitting as a jury, if it be sustained by substantial evidence; nor will this court reverse the judgment of the trial court on the ground of error which is harmless.

2. **Damages:** BREACH OF WARRANTY. When a tank, which is built to order and is not as warranted, bursts, and the bursting of it results not from defects covered by the warranty but from careless handling of it by the vendee, the damages thus occasioned cannot be recovered from the warrantor.

Appeal from the St. Louis City Circuit Court. HON. JAMES A. SEDDON, Judge.

AFFIRMED.

Hiram J. Grover, for the appellants.

The court erred in holding that the doctrine laid down in *Yeats v. Ballentine*, 56 Mo. 530, had any application to this case. The decision there proceeded upon the theory that, although the thing delivered might not comply with the contract of sale, yet if the purchaser accepted it and used it, and was benefited by it, the law created a new contract with a new consideration, to-wit: The purchaser must be held to pay for the

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benefit, or advantage derived by him from such use and enjoyment. The mere delivery of the tank to the defendants and their action on repairing the tank did not constitute an acceptance of the tank by them. 2 Benjamin Sales [4 Ed.] sec. 1350; *Calhoun v. Paule*, 26 Mo. App. 285; 1 Smith's Leading Cases [8 Ed.] p. 321; *Haysler v. Owen*, 61 Mo. 273 and 274; *Munkres v. Railroad*, 72 Mo. 514; *Atherton v. Ryder*, 139 Mass. 371; *Cook v. Soule*, 46 N. Y. 420; *Campbell v. Miltenberger*, 26 La. 72; *Pinny v. Andrews*, 41 Vt. 641; *Fish v. Tank*, 12 Wis. 278, 305; *Cook v. Cartner*, 9 Cush. 266; Sedgwick, Damages [7 Ed.] p. 165. The defendants were entitled to resort to the breach of the express warranty in this case either as a defense or affirmative cause of action. *Brown v. Weldon*, 27 Mo. App. 253, 263; *Brown v. Turner*, 77 Mo. 494; *Voss v. Maguire*, 18 Mo. 477, 481; *Starr Glass Co. v. Morey*, 108 Mass. 573; *Cook v. Cartner*, 9 Cush. 266; R. S. Mo., secs. 3521, 3522; 2 Benjamin, Sales [4 Ed.] p. 1153; *Branson v. Turner*, 77 Mo. 493; *Courtney v. Boswell*, 65 Mo. 196; *Voss v. Maguire*, 18 Mo. App. 477, 481; *Martin v. Maxwell*, 18 Mo. App. 180; *Kerr v. Haymaker*, 20 Mo. App. 350; *Calhoun v. Paule*, 26 Mo. App. 274; *Brown v. Weldon*, 27 Mo. App. 261; *Hayner v. Churchill*, 29 Mo. App. 676; *Brigg v. Sheldon*, 99 N. Y. 517; *Day v. Poole*, 63 Barbour, 527; s. c., 52 N. Y. 416; Benjamin, Sales, Bennett's notes, p. 864, note. Plaintiffs, having agreed to deliver this material for the price of three hundred and sixty dollars, sued for $448.78, and introduced evidence to prove the value of such material as of March 8, 1887, the date of delivery; whereas they should have proved the value as of the date of the order for the material, to-wit: December 29, 1886, the evidence disclosing the fact that there had been an advance in the market price of the material between the dates. The real value of the material on the date of the contract might have been less than the contract price; in which event plaintiff, suing on a

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quantum valebat, could not be allowed to recover the contract price. Except in the case of building contracts or other contracts to do work on real estate, there is no rule of law in force in this state which allows a party, who has a right of action arising out of a contract only, to ignore the contract, treat it as a nullity and recover outside of the contract on what is called a *quantum meruit*. *Hannel v. Freund*, 17 Mo. App. 624; *Gruenzer v. Fur Co.*, 28 Mo. App. 266, 267; *Haysler v. Owen*, 61 Mo. 274-5.

John R. Myers and *John M. Holmes*, for the respondents.

A purchaser purchasing upon his own judgment, and not relying upon a warranty express or implied, cannot recover from the vendor on account of any defects which were patent and which were known to him at the time he bought. Benj. Sales., secs. 661, 657; 1 Chit. Cont. [11 Am. Ed.] p. 632. A warranty does not extend to patent defects known to the buyer, especially when the buyer is purchasing upon his own judgment. Benj. Sales, sec. 616, and note 2; sec. 618, note L; *Yeats v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 270. In this case appellants sold to their vendee, relying upon their own judgment exclusively, and with full knowledge of all defects now claimed to have existed, and the vendee bought from them with the same knowledge and relying upon his own judgment. The vendee McCormick filled the tank in a careless and improper manner. The judgment of the court below sitting as a jury is final as to the facts, and no error of law is shown by the record. *Meyer v. McCabe*, 73 Mo. 240; *Noble v. Metcalf*, 20 Mo. App. 362.

Rombauer, P. J., delivered the opinion of the court.

The plaintiffs are tank manufacturers in New Iberia, Louisiana. The defendants are dealers in water works

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supplies in St. Louis, Missouri, and occasional contractors for the erection of water works under the firm name of Fairbanks & Co. The tank hereinafter spoken of is a water tank used as part of such water works, and was known by the defendants to have been ordered for such purpose.

This being the situation of the parties, they entered into a contract evidenced by the following correspondence:

"December 20, 1886.

"*Messrs. Fairbanks & Co., St. Louis, Mo.*

"GENTLEMEN:—We will furnish you one tank without hoops F. O. B. cars here, twenty-four-foot bottom and twenty-foot stave, made of three-inch material, in good workmanlike manner, for the sum of two hundred and fifty dollars ($250). If you desire this tank we will have to have an answer inside of ten days; can furnish you inside of thirty days from receipt of order. If necessary we will furnish the same tank with thirteen hoops. Bottom hoop 4-16x4, balance 1-4x4 inch iron with two sets of wrought iron lugs, to each, and double bolts in the bottom hoop and single bolts in others. All F. O. B. cars here for the sum of three hundred and sixty dollars ($360). Let us hear from you with order.

"Respectfully yours,

"CALLAHAN & LEWIS,"

"ST. LOUIS, December 29, 1886.

"*Messrs. Callahan & Lewis, New Iberia, La.*

"GENTLEMEN:—We have your favor of the twentieth. You may get us out one tank made of three-inch, red heart, cypress staves, twenty feet long, twenty-four feet in diameter at the bottom, to have thirteen hoops as follows: bottom hoop to be 5-16x5 inches, the remaining twelve to be 1-4x4 inch iron, each hoop to have two sets or pairs of wrought iron lugs; the bottom hoop to have double bolts, the remaining hoops to have single

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bolts, all bolts to be large enough to have as much strength as the riveted joints. The tank must be in first class shape, lumber all of even thickness. Staves all of same length, and tank to have a taper of six inches on each side, making a difference in the diameter of twelve inches between the bottom and the top of the tank. Please make no mistake now, we want a first class job. We will give you shipping instructions later. Please advise us how soon you will be ready to ship.

"Yours Truly,

"FAIRBANKS & Co.

"Each stave to have three three-fourths inch dowels in each edge, and all bottom pieces to have three-fourths inch dowels not over eight inches apart.

"F. & Co."

On receipt of the letter plaintiffs accepted the order in the following terms:

"NEW IBERIA, LA., January 4, 1886.

"*Messrs. Fairbanks & Co., St. Louis, Mo.*

"GENTLEMEN:—Your esteemed favor of twenty-ninth ult. came duly to hand. Thanks for same. The same shall have our prompt and careful attention. We would like to furnish you also the 24x16, as we have a fine large stock of sixteen-foot staves. With best wishes for the New Year, we are

"Yours respectfully,

"CALLAHAN & LEWIS."

The tank, thus ordered, was intended by defendants to be used as part of water works at Newport, Arkansas, there to be placed on top of a water tower. One McCormick was the contractor for such water works with the town, and the defendants had a contract with him for supplying the engines, pumps, water towers and wooden tank or reservoir, forming part of such water works.

It is conceded by all the evidence, that the plaintiffs were not manufacturers of tanks for water works, being,

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prior to their contract with the defendants, engaged mainly in the manufacture of a railroad standard tank of a dimension of twenty-four feet by sixteen, and had but little experience in constructing large tanks containing over five thousand gallons. The defendants were aware of that fact.

While the tank in question was being thus constructed, the plaintiffs wrote to the defendants repeatedly as follows: January 22, 1887. "We will make a No. 1 job of your twenty-four by twenty, all ready except setting up." February 5, 1887: "Will say we have your twenty-four by twenty ready to set up and will finish at our leisure—you shall have a thoroughly first class job." March 5, 1887: "The tank has been set up, knocked down and only waits for a few more hoops." March 8, 1887: "Enclosed please find B. L. and invoice for one tank shipped to Fairbanks & Co., care of A. H. McCormick, Newport, Arkansas. It is in first class shape and trust it will not be delayed."

The component parts of the tank were shipped as per above advice. Upon its arrival in Newport, Arkansas, the defendants' foreman, Parker, wrote the following letter to the defendants:

"NEWPORT, March 28, 1887.

"*Messrs. Fairbanks & Co.*

"GENTS:—There are thirteen hoops on this tank, the first one is five inches, and all the rest are four inches wide; the first is five-sixteenths of an inch thick, the balance are one-fourth of an inch. The question is, are there enough hoops or enough iron in them? The five-inch has one and nine-sixteenths of an inch of iron; the balance have but one inch; it looks light to me. If you think there is not enough you had better send the iron from there. The lugs on these are forged. The first hoop has two three-fourth inch bolts, the balance have one three-fourth inch bolt. All lugs and laps are riveted with six three-eighth inch rivets.

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All of which I will have to do over again for they are so badly done.

"Please send me six hundred dollars, and oblige,

"Yours truly,

"E. L. PARKER."

To which letter the defendants replied as follows:

"ST. LOUIS, March 31, 1887.

"*Mr. E. L. Parker, Newport, Arkansas.*

"DEAR SIR:—Put eight three-eighth inch rivets in all the joints in the four-inch hoops and ten rivets in the joints of the five-inch hoop.

"Keep an accurate account in detail of all expense in connection with this work and report same to us promptly.

"Enclosed find check for four hundred dollars."

On April 2, Fairbanks & Co. wrote to plaintiffs as follows:

"Dictated.

"ST. LOUIS, April 2, 1887.

"*Messrs. Callahan & Lewis, New Iberia, Louisiana.*

"GENTLEMEN:—We are in receipt of a letter from our superintendent of construction, at Newport, Arkansas, stating that the tank you furnished us for that place has two three-fourth inch draw rods in the bottom hoop and only one three-fourth inch rod in the balance of the hoops. Also, that the joints and lugs are riveted with six three-eighth inch rivets, and that the riveting is so poorly done that he will be obliged to do it over before the tank is set up.

"We will also say that we shall be obliged to rim out the holes and put in larger draw rods. The three-fourth inch draw rods are not over one-half as strong as the riveted joints, when properly put together.

"We shall also put more rivets in each joint.

"As soon as we get this work done we will send you bill for the same; and, also, the bill for the expense

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on the tank shipped to Beloit. We will deduct these amounts from your invoice of March 8, and remit you balance.

"Trusting this will be satisfactory, we remain,

"Yours truly,

"FAIRBANKS & Co."

To which the plaintiffs replied as follows:

"April 4, 1887.

"*Fairbanks & Co.*

"DEAR SIRS:—Answering your favor of the second inst. we will say, your superintendent is in error, we never furnished any three-fourth inch rods. Lugs had eight (8) rivets instead of six (6). We differ from him in regard to riveting. The riveting is all that can be asked. However you did not specify the size of the rivets, number of rivets nor size of bolts to be used. Please refer to our letter of December 20, 1886, and your order of December 29, 1886.

"We have given you what is customary with our trade and sold you the tank at New Iberia.

"Therefore we have nothing to do with the freight to Beloit, and will not pay this or any other charge.

"When we took your order we expected to ship in thirty (30) days. You ordered us not to be in a hurry. In the meantime we had orders for some ten (10) tanks of similar proportion, and used the iron set aside for your tank, and consequently instead of iron costing us ($1.80) one dollar and eighty cents at rolling mill, we had to pay ($2.40) two dollars and forty cents.

"Add to this our expense, hunting all the mill yards for forty (40) miles to find twenty feet dry material, to make staves, and you, gentlemen, will see that we have met with a loss, in order to serve you.

"We felt very much like asking you to cancel your order. But in order to please a customer, who in time, perhaps, would be of some assistance, we bore all this without a murmur. We did not agree to dowel the

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staves, which has been done. Please find enclosed corrected invoice for tank, above mentioned, reads three hundred and sixty dollars instead of three hundred and twenty dollars.

Yours very respectfully,
"CALLAHAN & LEWIS."

The tank was thereupon set up on the water tower. There was no complaint as to the material or work on the wooden part of the tank nor as to the material of the hoops. The defendants claim that the lugs, bolts and rivets were insufficient as originally furnished, and insufficient after being replaced by their foreman under the order contained in their letter of March 31. That therefore there was a breach of the warranty that *the tank must be in first class shape*, and *all bolts to be large enough to have as much strength as the riveted joints.*

The tank being set up, the contractor McCormick proceeded to pump water into it, whereupon it burst, owing to the insufficiency of its construction as the defendants claim, and owing to the carelessness of McCormick in filling it, as the plaintiffs claim, which bursting resulted in the destruction of its value as a tank and in causing serious injuries to property in the vicinity, for which McCormick paid in the first instance, the defendants prior to the institution of the suit refunding to him the amount paid.

The defendants, claiming that the plaintiffs were legally responsible to them for the loss thus caused, refused to pay for the tank, whereupon the plaintiffs first instituted a suit upon the contract, which they abandoned, and thereafter instituted the present suit, on a *quantum valebat* for the value of the material delivered to defendants at New Iberia, Louisiana. The defendants by answer set up the special contract and a breach of warranty, claiming, by way of counter-claim, the damages sustained by them, by the insufficiency of

the tank, and a counter-claim upon another and different contract in the sale of a tank for Beloit, Wisconsin. The cause was tried by the court sitting as a jury, and resulted in a judgment in favor of plaintiffs on the main issue, and also on the first counter-claim, and in a small judgment in defendants' favor on the second counter-claim.

Upon the close of the evidence, the defendants asked ten instructions, putting before the court the various phases of the evidence on the main cause of action as well as on the counter-claim. The plaintiffs asked two instructions, relating solely to the counter-claims. The court refused all these instructions, and upon its own motion filed in the case a written opinion containing declarations of law and a finding of facts, which is made part of the record. As this declaration and finding raises every question discussed by counsel upon this appeal, we insert it in full. It is as follows:

"PLAINTIFFS' CAUSE OF ACTION.

"It is the settled law of this state that, where a contractor fails to perform his contract according to the stipulations of his agreement, he cannot recover on the contract. But if the work actually performed by him is of value, and is accepted by the other party, such party would be liable to pay the actual value of the work performed, not exceeding the contract price, after deducting therefrom damages from a breach of the contract. *Yeats v. Ballentine*, 56 Mo. 530; *Eyerman v. Association*, 61 Mo. 489; *Davis v. Brown*, 67 Mo. 313.

"In this case the plaintiff admits that he did not perform strictly his contract, by suing not on the contract but on a *quantum valebat*.

"He contracted to deliver at New Iberia, Louisiana, a tank made according to certain specifications, with the additional guarantee that it should be a first-class job. By a tank we understand, when we consider all

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the circumstances surrounding the parties, was meant all the component parts of a water tank, in a condition ready to be "set up" and in a condition when so set up, or put together, such as to constitute a vessel to hold water.

"The petition describes the component parts of such a tank or vessel, with reasonable certainty, and the evidence shows that they were delivered at New Iberia as agreed, and were, after full inspection, received by the defendant. Independently of any subsequent breach of warranty, on accepting the property, the defendants became then and there liable to pay the reasonable value of the material. When the defendants received the property, they were not satisfied that it was according to contract, and went to work to make it comply therewith, to their satisfaction. In so doing they were put to an expense of $14.55.

"This evidence showed that the property was fully and intrinsically worth the contract price. So the plaintiff is entitled to recover that amount, less the $14.55, expended by the defendant, which the court finds to be a reasonable expense.

"That the defendant was subsequently damaged by a breach of a collateral agreement of warranty, is a separate cause of action, the subject-matter of a counterclaim, to be set up by the defendant.

"The right of the plaintiff to be paid the reasonable value of the property delivered accrued immediately on delivery, and suit might have been brought immediately, before any damages accrued by reason of a breach of warranty.

"The court therefore gives judgment for the plaintiff for the sum of $345.45, with interest at the rate of six per cent. from the date of demand, thirty-first of May, 1887, being the contract price, less $14.55, the cost of putting the tank in condition satisfactory to the defendants.

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"DEFENDANTS' FIRST COUNTER-CLAIM.

"The agreement of the parties being expressed and committed to writing, there is no room for any implied contract of warranty. But undoubtedly there was an express warranty that the tank should be manufactured according to the specifications, and that it should be a first class job. When we consider the circumstances surrounding the contracting parties, there is no difficulty in determining that they meant by first class job, that it should be strictly according to the specifications, and, where there were no specifications detailed, that the tank should be reasonably fit for the purposes for which it was intended, and that it was intended for the purposes of a water tank, to be used in connection with a water works system for the supply of some town or city with water for drinking and other usual purposes. The plaintiff also knew that the tank was to be placed on a tower to be elevated at a greater or less heighth, according to the circumstances.

"Where there is a breach of such a warranty, the injured party is entitled to recover such damages as may be held to have been in the reasonable contemplation of the parties. We think it is quite clear that it was within the reasonable contemplation of the parties that the tank should be put on such an elevation as this one was placed on, and that, if it was so defective as not to be reasonably fit for the purpose of holding water enough to fill it, that it would burst, and as a consequence do injury to persons and property, this ought to be held to have been within the reasonable contemplation of the parties, at the time they made the contract.

"If the defendant had accepted the tank as delivered to them, and placed it in position in a proper manner, and had skilfully fitted it, and it then had burst on account of the fact that it was so defective as to be not reasonably fit, viz., not a first class job, the defendant would have surely been entitled to recover. But this

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the defendants did not do. When the tank arrived they gave it a careful inspection, and found that it was defective and not reasonably fit for use, that there were not sufficient rivets attaching the lugs to the hoops, that at least one of the lugs was not sufficient, and that the bolts were not large enough. The defendants then wrote to the plaintiffs, complaining of the rivets and bolts, and informing them that they were defective, that they would put in proper bolts or draw rods and rivets, and would charge the expense to the plaintiffs. They then went to work with the materials to make a tank which, in their opinion, would stand the necessary pressure; they put in new rivets, about ten new draw rods, and repaired or strengthened one lug (by the way, we may say here that it appeared that this lug was broken when the tank burst, and it does not appear what effect its breaking may have had in causing the accident); when they had reconstructed or repaired the tank so that it was, in their opinion, sufficient, they then, and not until then, set it up. An attempt was made to show that, as soon as they got the letter from the plaintiffs protesting that the work was done according to contract, they abandoned the idea of relying on their own judgment and relied on the assurance of the plaintiffs, but we do not think this was proven.

"Though it is claimed that the evidence showed that the tank burst by reason of defects in other portions of the tank, and that such work as was done by defendants actually served to strengthen, yet, assuming that, we do not think the defendant entitled to recover; we think when the defendant refused to accept the tank, except conditionally, pointed out the defects in it, claimed the right and undertook to put the tank in proper condition at the expense of the plaintiffs, a right they undoubtedly had, they then relieved the plaintiffs of all further responsibility. If, after undertaking at the expense of the plaintiffs to put the tank into a proper condition,

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they made an error in judgment, how can they, with any kind of fairness or consistency, make the plaintiffs responsible for that error of judgment and its immediate results. Had they not already elected to take the tank subject to the condition that they should put it into fit condition at the expense of the plaintiffs, and did they not have an action immediately against the plaintiffs for the costs of so putting it into condition?

"Moreover there is another consideration which ought to prevent the defendant from recovering. The defendants cannot recover against the plaintiffs, unless McCormick could have rightfully recovered against the defendants. For the plaintiffs are only liable under the evidence here adduced could McCormick have recovered from defendants.

"The defendants may fairly be considered in relation to McCormick as a manufacturer.

"Where a manufacturer sells to another an article to accomplish a particular purpose, there is an implied warranty that it is reasonably fit therefor. *Gerst v. Jones*, 32 Gratt. 526; *Poland v. Miller*, 85 Ind. 391.

"Therefore there was an implied warranty on the part of the defendants to McCormick, that the tank was reasonably fit for the purposes of a water tank, and that the defendant would be responsible to him for all damages which might ensue from any breach of the warranty within the reasonable contemplation of the parties. But it cannot be held that damages resulting from the gross negligence of the party, or which could have been prevented by reasonable care, was within the contemplation of the parties.

"Now, what were the facts? McCormick and his foreman, a skilled mechanic and expert in such matters, examined the tank when it arrived; they were in constant communication with defendant and his agents, they pronounced the tank defective, did not know the lugs and thought the bolts too small. McCormick and his foreman expressed their fears and belief that the tank

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did not have sufficient strength to hold the water it was designed to hold. McCormick admits that his foreman told him he was a "damned fool for not substituting new bolts of Russian iron throughout." There was an attempt to show that McCormick had an apprehension about the strength of the bolts, but only feared that the tank could not be drawn sufficiently tight to prevent the water from leaking out, but it is apparent that McCormick knew enough to put him on his guard, and to require of him the duty of using great precautions in filling the tank and testing it.

"When it had been filled to about seven feet, one of the bolts on about the seventh or eighth hoop, which had not yet begun to feel the extreme pressure of the water, broke, and shortly afterwards another broke. McCormick substituted wrought iron bolts for these, and, after waiting some time, he again proceeded with the filling of the tank; paying, so far as the evidence shows, apparently no attention to all these warnings.

"The only explanation he has to give for his apparent carelessness in so doing after two bolts had broken under slight pressure, and after he had expressed the opinion that the bolts were not sufficient, is that he did not think that they would all break at once. How, then, can the defendants claim that it was within the reasonable contemplation of the plaintiffs that they would all break at once, and would cause the tank to burst?

"Therefore we think that the defendants are not entitled to recover on their first counter-claim.

"On the second counter-claim we think the defendants are only entitled to recover $7.50, the cost of plugging up the pin holes, also for refitting the hoops, $16.75, making an aggregate of $24.25 with interest from institution of suit."

It appears, from the foregoing, that the court found the facts to be as follows: *First.* That the property in question was sold by the plaintiffs to the defendants

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not as so much lumber and iron, but as component parts of an entire water tank with special warranty that such tank was in conformity with the specifications agreed upon, on all subjects covered by the specifications, and was a first class job, for a water tank of the dimensions described. *Second.* That the defendants, after inspection of the property, accepted it subject to certain reclamations for defects, which were remedied, or were claimed to have been remedied, at an expense of $14.55; that the property was intrinsically worth the contract price and more, and that the only damages, if any, suffered by the defendants and traceable to the breach of the contract of warranty, was the expenditure thus incurred. *Third.* That the bursting of the water tank was not the result of any patent or latent defect in its construction, but the result of the negligence of McCormick in filling it.

The court also declared the law upon these facts to be as follows: *First.* That the defendants, upon delivery and acceptance of the property, became liable to pay its reasonable value, not exceeding the contract price, and had to assert in a cross-action their claim, if any, for damages suffered by the breach of plaintiffs' warranty, *Second.* That the destruction of the tank, and incidental injury to adjacent property, were proximate damages within the contemplation of the parties, and if the damages thus caused were traceable to a defective construction of the tank in matters warranted by the plaintiffs, the defendants could recover for them in their counter-claim; if, on the other hand, such damages were the result of McCormick's negligence, they could not.

We have examined the testimony and find that there is substantial evidence justifying the court's finding of facts. With the weight of that evidence we have nothing to do, as this case is not one reviewable upon the weight of evidence. *Meyer v. McCabe*, 73 Mo. 240. The delivery of the articles in New Iberia, Louisiana, to

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the defendants, was not equivalent to their acceptance by them. That proposition was discussed in *Calhoun v. Paule*, 26 Mo. App. 274, and its correctness may be conceded. We may further concede that the defendants had a right to reject the tank upon its arrival at Newport, Arkansas, if it was not in conformity with the plaintiffs' warranty, and even that they had a right to make such alterations in it at the plaintiffs' expense as to conform it to the article warranted. They might do all this without waiving their right of action on the warranty. On the other hand, it must be conceded that their taking possession of it, making such alterations on it as they deemed necessary, and delivering it thereafter to McCormick, their vendee, was some evidence that they accepted it, and that, after the alterations were made, they considered it as being in substantial compliance with the warranty.

The defendants contend that it was an erroneous view of the law for the court to hold that they became liable to pay for the tank upon its receipt and acceptance, and that, thereafter, their sole remedy was by cross-action on the warranty. There has been some conflict of authority on that question, depending on the facts as to when the contract ceases to be executory and becomes executed, and on the further fact whether the breach is equivalent to a partial or total failure of consideration. But it is evident that, if the court on that subject was mistaken in its ruling, the error was harmless. The court permitted a recoupment in favor of the defendants to the extent of $14.55 in the main action, on the ground that there was a failure of consideration to that extent, as such amount was necessarily expended. In finding in favor of plaintiffs upon the counter-claim, the court necessarily held that the breach of warranty did not extend beyond the defects thus remedied, that is to say, that the bursting of the tank was not due to the fact that it was not, when thus reconstructed, up to the warranted standard, but was due to the fact that it

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was negligently filled by McCormick. As on this last subject, there was substantial evidence, we are not warranted to reverse the judgment, unless the court applied in its consideration erroneous views of law.

The defendants contend that the court made an erroneous application of the rule discussed in *Yeats v. Ballentine*, 56 Mo. 530, to the facts of this case. The rule in such cases, as defendants contend, is not that a recovery on a *quantum meruit* is justified because the work is of value, but because it is of value to the party accepting it, and if it is of no value to the latter there can be no recovery. Conceding this to be the true limitation, we are still remitted to the original inquiry, whether the bursting of the tank was the result of defects in its construction, warranted against. If it was the result of its subsequent careless handling, the loss caused by the acts of the defendants and their vendee cannot be visited on the plaintiffs, on any theory which we can conceive. The rule stated in *Yeats v. Ballentine* has always been the rule in case of sales of chattels, so that it is immaterial whether we treat this as a building contract, or a contract of sale. It is only in cases of express contract for personal services and illegal contracts, that no recovery can be had upon a *quantum meruit* or *quantum valebat.*

Other propositions are discussed in the exhaustive brief of defendants' counsel, which we cannot notice in detail without extending this opinion to an unseemly length. We may dispose of them with the general remark that they all substantially bear on the same proposition, namely, that, under the law governing an express warranty against latent or patent defects, the trial court should have arrived at a different conclusion of facts. This is no ground on which we can reverse the judgment.

All the judges concurring, the judgment is affirmed.

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James Dawson, Respondent, v. Eva V. Dawson Appellant.

St. Louis Court of Appeals, May 28, 1889.

1. **Appellate Practice: JURISDICTION TO GRANT ALIMONY PENDENTE LITE.** While this court cannot by an independent order enlarge or limit an allowance for alimony *pendente lite,* made by the circuit court, it may, in making a final decree of its own, granting a divorce to the husband, direct the payment of alimony as a condition to the entry of the decree.

2. **Divorce: ALIMONY, PENDENTE LITE.** Alimony *pendente lite,* in so far as it is granted to defray counsel fees and costs of suit, ceases at once upon the final ascertainment of the wife's guilt; but such alimony, in so far as it is allowed for the support and maintenance of the wife, unless vacated or modified, continues until the actual dissolution, by a final decree of divorce, of the bonds of matrimony.

Appeal from the St. Louis County Circuit Court. Hon. Elijah Robinson, Special Judge.

Reversed (*nisi*).

Zach. J. Mitchell, for the appellant.

Alexander Martin, for the respondent.

Rombauer, P. J., delivered the opinion of the court.

The plaintiff filed his petition for divorce in February, 1885. In June, 1885, the trial court, on a motion for alimony *pendente lite*, made the following order in the case: "It is ordered that the plaintiff pay to the defendant for her separate maintenance of self and child during the pendency of this suit the sum of fifty dollars per month on the first day of each and every month commencing on the first day of June, 1885, also the sum of one hundred dollars to and for the use of

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counsel." The defendant thereupon filed her answer and cross-bill, and an application for a change of venue, the latter resulting in an agreement under the statute to try the case before a special judge. Upon a hearing of the cause, the judge dismissed both bill and cross-bill, and from the decree the plaintiff alone appealed to this court. No order was made continuing or discontinuing the alimony as part of the decree, nor was any order made touching alimony during the pendency of the appeal. The plaintiff under the advice of his counsel continued to pay the alimony after the appeal as before.

The decree in the trial court was rendered in December, 1885. In May, 1886, that decree was reversed by this court and the cause was remanded to the trial court with directions, "to enter a decree for the plaintiff dissolving the bonds of matrimony between him and the defendant, the plaintiff first paying to the defendant, or into court for her use, all arrearages, if any, in the alimony heretofore awarded to her by the trial court." 23 Mo. App. 175. This order was presented by plaintiff to the judge of the circuit court, from whom the venue had been changed, and he entered a decree in substantial compliance with such order, May 11, 1886, whereupon the defendant appealed, claiming that the judge had no jurisdiction in the premises. Upon this second appeal, the decree was again reversed on the sole ground that a special judge duly appointed to try a cause, in place of the disqualified regular judge, will continue in authority as to all matters arising in that cause until its final determination, unless superseded by another special or regular judge not under disqualification. 29 Mo. App. 525.

When the cause was here upon this second appeal, this court in its opinion said: "It appears that after the receipt below of the mandate, the plaintiff paid into court, to the use of the defendant, the sum of one hundred dollars, which had been specially allowed to her for counsel fees, and in connection with this an entry

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appears to the effect *that it was by counsel admitted and agreed that no alimony had been paid therein since that for the month of March, 1886.* The record shows further an order for alimony *pendente lite* of fifty dollars per month, beginning on June 1, 1885. We have no means of ascertaining what payments had been made under this order, other than the admission and agreement above mentioned; from which it would appear that something yet remained in arrear, in addition to the one hundred dollars deposited. It is unnecessary, however, for us to do anything more than to repeat the direction contained in our former opinion, in accordance with which the trial court will proceed to inquire into the fact of existing arrearages, *if any there be*, and make such order thereupon as shall carry out the terms of our former decision."

The second decree and order of this court was presented by the plaintiff to the special judge, June 22, 1888, and he thereupon made a final decree dissolving the bonds of matrimony between plaintiff and defendant, and finding that no arrearages of alimony were due to the defendant, as the plaintiff had paid into court, to the use of the defendant, the sum of one hundred dollars as alimony for the months of April and May, 1886, and up to the date of decree in favor of the plaintiff in the St. Louis court of appeals. From this last decree the defendant appeals, claiming that the order for alimony entered in June, 1885, continued in force during the successive appeals, and that the trial court upon final decree in June, 1888, should have decreed her alimony up to that date.

The defendant, appealing, refers us to no authorities in support of this position, but claims that such is the necessary result of the fact that an allowance *pendente lite* had been made, and had never been vacated, and that such is in substance the view expressed by this court upon former appeals of this case.

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The plaintiff claims that an order for alimony *pendente lite* does not continue in force after judgment in the trial court, as it naturally refers to the suit while pending in the court where the order is made. No decision directly in point is cited, although it would seem that it was the practice of the ecclesiastical courts upon a proper showing to make a new order upon application after the appeal was granted. *Loveden v. Loveden*, 1 Phill. Ec. Rep. 208; *Jones v. Jones*, 41 Law J. P. & M. 53. Intimations are found even in these cases that the practice is unsettled whether the alimony, originally granted, continued during the appeal. In states where appellate courts entertain such motions, upon a proper showing, alimony *pendente lite* has been granted to the wife upon appeal. *Friend v. Friend*, 65 Wis. 412; *Chaffee v. Chaffee*, 14 Mich. 464. In this state it must now be considered settled that appellate courts have no jurisdiction to make allowances by way of alimony to the wife during pendency of the appeal (*State ex rel. v. St. Louis Court of Appeals*, 88 Mo. 135), but that the power resides alone in the circuit courts, and that even the latter court is powerless to make any order to that effect after the appeal has been perfected. *State ex rel. Gercke v. Seddon*, 93 Mo. 520; *Lewis v. Lewis*, 20 Mo. App. 546.

It would thus seem that the order for temporary alimony made by the circuit court in this case, being unappealed from, could not upon former appeals in this case, in any way be enlarged or limited by this court by any order made upon former appeals of this case, nor could the circuit court, by anything it did, enlarge or modify its order of alimony subsequent to granting the appeal, until it had re-acquired jurisdiction of the cause. At the same time it must be conceded that this court, being vested with full and final jurisdiction, and untrammelled in making a final decree of its own, could attach any proper conditions to such decree, and its so doing was in no sense a usurpation of judicial power.

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It appeared upon the former appeals that, after the allowance of the first appeal in this case, all the parties treated and considered the order for temporary alimony as subsisting and in force during the pendency of the first appeal. The plaintiff continued to pay such alimony, as is admitted under advice of his counsel, that if he discontinued it, he might, under the then unquestioned rule established in *Miller v. Miller*, 12 Mo. App. 593, be compelled to pay at least the same amount, by an independent order of the circuit court or of this court. Upon the second trial of the cause, as is shown by the record, he admitted and agreed that "no alimony had been paid to his wife since *that* for the month of March, 1886," conceding that the money thus paid by him was part of the alimony provided for by the order of June 1, 1885, since there is no pretense that the admission could relate to any other alimony. This court, both upon the first and second appeal of the case, conditioned its decree in plaintiff's favor on the prior payment by him of all arrearages of alimony, if any. This condition could refer to nothing else but to that part of the monthly alimony subsequent to the first appeal remaining unpaid, since it was admitted by the record that the alimony up to March, 1886, a date long subsequent to the first appeal, had been fully paid.

If the plaintiff was dissatisfied with the decree of this court, he should have sought to modify it, but he could not avail himself of the decree as far as it directed a decree of divorce in his favor, and repudiate it as far as it imposed any conditions upon him. If he was anxious to bring the cause to an immediate termination, he should have moved for final decree in this court on the ground of the long lapse of time, before he could obtain final relief in the trial court, owing to the fact that its terms were only semi-annual.

These observations dispose of all but one question in this case, which is the only one entitled to serious consideration, namely, did the alimony in this case cease

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upon the adjudication by this court that the plaintiff was the aggrieved party, and as such entitled to a divorce.

That the alimony as far as the same related to counsel fees and costs of litigation at once ceased upon the final ascertainment of the wife's guilt seems to admit of no dispute under the authorities. The rule in England has always been that, where the wife has brought her case to a hearing and fails, she is entitled to no costs. The plaintiff cites *Wagner v. Wagner*, 34 Minn, 441, where an allowance of counsel fees was denied; *Newman v. Newman*, 69 Ill. 167, where an order for solicitor's fees was denied; *Wilde v. Wilde*, 2 Nev. 306, where an order for past costs and expenses was denied; *Perry v. Perry*, 2 Barb. Chan. 285, where an order for money to prosecute and for costs was denied; and *Krause v. Krause*, 23 Wis. 354, where a motion for money to enable the defendant to prosecute her appeal was denied. All these were cases where the wife's guilt was established by confession or decree, and the order related either to past expenses incurred, or contemplated expenses to be incurred in a litigation admittedly groundless. *O'Haley v. O'Haley*, 31 Tex. 502, is the only case cited, where the court refused to enforce an execution, in favor of a plaintiff wife for past alimony in the nature of support money after the wife had failed to obtain a decree, on the ground that the order was made in consequence of her false representations, and therefore it was the duty of the court to nullify it. It will be, however, noticed that, in the last case, the wife was plaintiff, a decree in her favor was denied, and the decree left the parties as husband and wife, with an unquestioned liability on part of the husband to pay for his wife's support, past and present.

The learned counsel for plaintiff maintains that there is no substantial difference between support money and suit money. This, we think, is an erroneous view. "The term alimony," says Judge Bliss in *Waters v. Waters*,

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49 Mo. 387, "in its limited sense means an allowance made to the wife out of the husband's estate for her maintenance either during a matrimonial suit or at its termination, when she has proved herself entitled to a separate maintenance." He then proceeds to state that, in its wider sense, it includes both expenses of living and suit money, quoting from Bishop, section 368, as follows: "This sustenance is in fact a sort of alimony, the one—*alimony proper*—being for defraying the ordinary expenses of the wife in the matter of living; the other being for the same purpose in the matter of the suit." In *State ex rel. Gercke v. Seddon*, 93 Mo. 522, Judge BRACE says: "The wife is entitled to alimony *and suit money* as long as the litigation continues." In the case at bar, the order made by the trial court, June, 1885, distinctly specifies that plaintiff should pay the defendant for her separate maintenance of self and child the sum of fifty dollars per month, and then provides for a separate sum for expenses of litigation, thus clearly separating what both Judges BLISS and BRACE denominate as alimony proper and suit money.

It might well be said, as all the cases hold, that the husband can on no principle be subjected to the payment of the costs and expenses of a litigation shown to be groundless, either by the wife's bill, or by her confession or by the decree of a court, but it does not follow that he is absolved from his liability to provide for her support and that of their child before the bonds of matrimony between himself and her are dissolved by final decree.

In the present case, the husband was the only party who controlled the litigation from the time he took his first appeal until the date when the special judge, after the second reversal, entered a decree of divorce in his favor. If he went with the decree of this court to a tribunal which, under the decisions in this state had no jurisdiction in the premises, a decree entered by such tribunal could neither dissolve the bonds of matrimony

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between himself and his wife, nor absolve him from paying, by way of sustenance to his wife, the amount which the trial court, with his own acquiescence, had fixed upon as proper alimony during the pendency of the suit. The alimony thus fixed clearly continued until the date of the decree by the special judge. The special judge erred in allowing the wife counsel fees for the litigation in this court, after the wife had been adjudged to be the guilty party, but equally erred in not allowing her alimony for sustenance of herself and child, at the rate fixed and agreed upon.

It results from the foregoing that the decree of the trial court must be reversed, and the cause remanded with directions to enter a decree similar in all respects to the decree which was entered, but with the addition that the plaintiff be adjudged to pay the defendant the arrears of alimony *pendente lite* from the time when he ceased paying the same to include the month of June, 1888, less whatever that court may have allowed for counsel fees, past or prospective, after the rendition of the first decree in this court, unless the plaintiff, within ten days, pays such amount into this court to the defendant's use. If the plaintiff prefers to do the latter a decree will be entered in this court upon his so doing affirming the decree of the special judge. All the judges concur.

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STATE OF MISSOURI, Respondent, v. EDWARD JAMES, Appellant.

Kansas City Court of Appeals, May 30, 1889.

1. **Disturbing the Peace:** SUFFICIENCY OF INDICTMENT FOR. An indictment under section 1527, Revised Statutes, which charges that E. J. on etc., at etc., did unlawfully and wilfully disturb the peace of a certain family, to-wit, etc., by then and there cursing and swearing and by loud and unusual noise against, etc., is fatally insufficient as it fails to set forth the charge with such precision and fulness as to inform defendant of the offense and the cause of the accusation.

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2. **Indictment: RULE AS TO FOLLOWING THE WORDS OF THE STATUTE.** **It is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice from the mere adoption of the statutory terms what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute.**

Appeal from the Moniteau Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

Moore & Williams, for the appellant.

(1) The indictment was insufficient, and the motion in arrest should have been sustained. (2) The first clause does not use the language of the statute which specifies the character of the acts constituting the offense of disturbing the peace. (3) The second clause specifies no acts constituting the offense. R. S. 1879, sec. 1527; *State v. Bach*, 25 Mo. App. 554; *State v. Hayward*, 83 Mo. 299-311 and citations; *State v. Crooker*, 95 Mo. 389; *State v. Rochford*, 52 Mo. 199; *Stener v. State*, 17 Rep. [Wis.] 670; Heard, Crim. Plead. and Prac. 161 to 166, inclusive; 1 Arch. Crim. Plead. 88 (side page); Whar. Crim. Pl. and Prac., sec. 220; 1 Bish. Crim. Prac., sec. 81; Const. Mo., art. 2, sec. 22.

No brief for respondent.

SMITH, P. J.—The defendant was indicted, tried and convicted in the circuit court of Moniteau county for the crime of disturbing the peace of a family. He prosecuted his appeal here from the judgment of said court on the ground mainly that the indictment, which was based on section 1527, Revised Statutes, and which charges "that Edward James, the defendant, on the first day of February, A. D. 1888, etc., did unlawfully and wilfully disturb the peace of a certain family, to-wit:—The

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family of Richard Cox, by then and there cursing and swearing and by loud and unusual noise against the peace and dignity of the state," was insufficient. If this ground of objection is well taken it is fatal to the judgment.

The question which we have to decide is whether the charge of the indictment is sufficient to hold the defendant to answer the same. It will be observed that the charge of "cursing and swearing" is not included in the said statutory group of offenses. So much of the charge as is embraced in these words is mere surplusage.

The question is therefore narrowed down to whether the indictment which charges the disturbance of the peace of the family "by loud and unusual noise" is sufficient in law.

The twenty-second section of article 2 of the constitution of this state in effect provides that no one shall be held to answer a criminal charge unless the crime with which it is intended to charge him is set forth with such precision and fulness as to inform him of the offense and the cause of the accusation.

The rule of pleading is that when all the facts which constitute the offense are set forth in the statute it will be sufficient to charge the offense in the language of the statute. *State v. Kesterling*, 12 Mo. 565; *State v. Davis*, 70 Mo. 467.

But when the statute punishes an offense by its legal designation without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offense named at common law. It has been affirmed that in general principles of common-law pleading it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice from the mere adoption of the statutory terms what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the

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statute. And it is no more allowable under a statutory charge to put the defendant on trial without specification of the offense than it would be under the common law. Wharton, Cr. Pl. and Prac., sec. 220; *State v. Gardner*, 28 Mo. 90; *State v. Rochford*, 52 Mo. 199; *State v. Davis*, 70 Mo. 467; *State v. Hayward*, 83 Mo. 299; *State v. Crooker*, 95 Mo. 390.

In view of these principles of pleading in criminal cases we think the indictment in question charging the defendant with disturbing the peace of a family in the language of the statute—"by loud and unusual noise," is insufficient because there are many and divers ways and means of making such noise, and that these terms do not import the specific act.

There is a total want of specification under the charge. Whether the "loud and unusual noise" was made by the discharging of fire arms, cursing and swearing or hallooing, or by any other manner or means, the indictment fails to inform the defendant as it ought to have done before he could have been called upon to answer the substantial charge therein contained. *State v. Davis*, 70 Mo. 467; *State v. Hayward*, 83 Mo. 304; *State v. Flint*, 62 Mo. 393.

It is not however to be understood from what is here said that the principles of pleading, upon which this case has been disposed of, are applicable to those offenses mentioned in said section 1527, which are individuated by the words of the statute itself.

It follows from these observations that the judgment of the circuit court must be reversed and the defendant discharged. All concur.

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CHRISTOPHER MCHONEY, Respondent, v. GERMAN INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, April 15 and May 30, 1889.

Practice: FAILURE TO FILE INSTRUMENT SUED ON: MOTION TO DISMISS. Plaintiff's petition was founded on a policy of insurance, charged to have been executed by the defendant, which he failed to file with the petition and to assign any reason therefor. On motion to dismiss, plaintiff seeks to avoid his failure to file the policy on grounds *aliunde* the petition, to-wit: That the application signed by plaintiff was part of the policy, and so the instrument sued upon was signed by both parties and is not required to be filed. *Held,* that the court must, in passing upon the motion, look to the petition and the instrument filed with it, or, if not filed, to the reasons for the omission shown in the petition.

REVERSED AND DISMISSED.

On motion for rehearing.

INSTRUMENT SIGNED BY BOTH PARTIES: IN FURTHERANCE OF JUSTICE, CAUSE REMANDED. While the motion to dismiss should have been sustained, yet as it appears from the record of the trial that the policy was based upon an application signed by plaintiff and made a part of the contract, thereby making the contract in legal effect an instrument signed by both parties, it would better subserve the ends of justice to remand the cause that the petition may be amended so as to charge the instrument to be a contract executed by both parties.

Appeal from the Montgomery Circuit Court.—HON. E. M. HUGHES, Judge.

MOTION OVERRULED AND CAUSE REMANDED.

J. D. Barnett, for the appellant.

(1) The motion to dismiss should have been sustained, for the reason that the policy sued on was not filed. *Rothwell v. Morgan,* 37 Mo. 107; *Railroad v. Knudson,* 62 Mo. 570. (2) The defendant's objection

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to the introduction of any evidence in the case and its specific objection to the introduction of the policy should have been sustained. The policy was not on file and was not identified in any respect. (3) The application for insurance is a written, unilateral contract on part of plaintiff.

John M. Barker and *Barker & Shackelford*, for the respondent.

The motion to dismiss was properly overruled. The case of *Rothwell v. Morgan*, 37 Mo. 107, is not in point. It is not apparent from the opinion in that case what kind of an instrument was sued upon, but it is said to be a note in *Bondsall v. Davis*, 58 Mo. 138. Nor is the case of *Railroad v. Knudson*, 62 Mo. 569,—for the reason that the subject-matter of that action seems to have been a complete contract, executed by the opposite party only. In the case at bar it rests upon a policy held by the plaintiff and an application held by defendant, both component parts of the contract sued on. May on Insurance [Ed. 1875] sec. 29, p. 26. Revised Statutes, 1879, section 3560, does not apply to this case. *Bowling v. Hax & Krug*, 55 Mo. 446; *Ass'n v. Duboch*, 82 Mo. 475. Said motion was also properly overruled because defendant had filed his answer two weeks before the motion, admitting in the answer the execution of the policy. He also had the policy in his own possession from May 24, 1888, down to and after his motion came before the court. But this point has been expressly ruled against appellant in the case of *Railroad v. Atkinson*, 17 Mo. App. 484.

Ellison, J.—This action is brought by petition founded upon an instrument of writing charged to have been executed by defendant. The instrument is not filed with the petition, nor is it alleged therein to be lost or destroyed. Defendant's motion to dismiss the

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case, based on such ground, was overruled. The instrument sued upon is a policy of fire insurance charged to have been executed by defendant. The motion should have been sustained. *Hannibal & St. Joseph Ry. Co. v. Knudson*, 62 Mo. 569; *Rothwell v. Morgan*, 37 Mo. 107; *Dyer v. Murdock*, 38 Mo. 224; *Peake v. Bell*, 65 Mo. 224, and cases cited. Plaintiff seeks to avoid his failure to file the policy on the grounds which he shows *aliunde* the petition, viz., there was a separate written application for insurance, made and signed by him before the policy was issued, which, by the terms of the policy, became a part thereof, and that therefore the instrument sued upon was, in effect, executed by both parties and not subject, under adjudications in this state, to the provisions of section 3560, Revised Statutes, 1879, requiring instruments "executed by the other party" to be filed. The difficulty with this contention is that these matters are not shown by the petition, if, indeed, they are not contradicted by it.

The petition refers to nothing but the policy, which it charges to have been executed by defendant.

It is upon the petition and the instrument filed with it, or if not filed, to the reasons for the omission, that the court must look to in passing upon the motion which attacks the case for this defect.

The judgment is therefore reversed and the cause dismissed. All concur.

ON MOTION FOR REHEARING.

ELLISON, J.—On further consideration we are of the opinion that, though the motion to dismiss should have been sustained, yet as it appears from the record made at the trial after the motion was overruled that the policy of insurance is based on a written application made and signed by plaintiff, which application is by the policy made a part of the contract, thereby making the contract in legal effect an instrument signed by

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both parties, we have concluded it would better subserve the ends of justice to remand the cause that plaintiff may have an opportunity to amend his petition so as to show the facts making the instrument sued upon to be a contract executed by both parties, and therefore not necessary to be filed, section 3560, Revised Statutes, 1879, as before stated, not covering such an instrument. *The Mo. Pac. Railway Co. v. Atkinson*, 17 Mo. App. 484, and cases cited.

The motion for rehearing will be overruled, Judges SMITH and GILL concurring.

ALBERT GOINS, by Guardian, Respondent, v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant. 37 221 37 678 37 221 40 469

Kansas City Court of Appeals, May 30, 1889.

Rehearing denied, December 2, 1889.

1. **Master and Servant: CORRELATIVE RIGHTS AND DUTIES AS TO MACHINERY: YOUNG AND INEXPERIENCED SERVANT: KNOWLEDGE OF DEFECT V. KNOWLEDGE OF RISK.** The master in providing safe and proper machinery for the use of the servant and keeping the same in repair is charged with only such care as prudent and careful men engaged in such work would be expected to and do exercise, and while the servant, in entering upon the employment, assumes all risks or perils, ordinarily incident to the nature of his engagement, he has a right to rely on the master's ordinary care that reasonably safe appliances are provided and kept in proper repair. Remissness in this duty renders the master liable to the servant injured thereby, while in the exercise of ordinary care, but he is not so liable if the injury resulted proximately from the want of such care by the servant. If the machinery be defective and the consequent risk therefrom be obvious, the servant will ordinarily be presumed to take notice thereof, and, by continuing the work without objection, will assume the risk of such defect. But, whereas,

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in this case, the defect is visible, yet, if by reason of his youth and inexperience, the servant (a boy seventeen years old) was not aware of the danger to which he was exposed in operating the defective car coupling (consisting of a bent pin and misshapen link fastened in the drawhead), it is the duty of the master to apprise him of such danger, and mere knowledge of such defect without apprehension of the probable consequent danger will not defeat the servant's recovery.

2. ——: ——: ——: MASTER'S KNOWLEDGE OF SERVANT'S SKILL. And, where the master has knowledge of the servant's skill and information (as a brakeman), he cannot defend by showing his want of proper skill.

Appeal from the Mercer Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

The following are plaintiff's instructions one and two mentioned in the opinion:

"1. The jury are instructed that it was the duty of the defendant to use all reasonable care and caution to provide for its employes good and well-constructed cars, adapted to the purpose for which they are used, and also to use all reasonable care and watchfulness in keeping said cars and the appliances and parts thereof in safe condition. And if the jury find from the evidence that the defendant failed so to do with respect to the pin or link in the drawhead of the car which Albert Goins was coupling to the train when he was injured, and that the said link and pin were bent and misshapen so as to be fast in the drawhead and thereby became unsafe to use in coupling said car, and that, by reason of the failure of the defendant to use reasonable care and watchfulness with respect to said car, the said link and pin were negligently or carelessly permitted to remain fast in said drawhead, and that while in that condition the defendant kept said car in use, and the plaintiff, while using reasonable care in coupling said car, had his hand caught between the drawheads of the cars, and

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that he received said injury by reason of said defective condition of said link or pin, then the jury will find for plaintiff, provided the said Albert Goins, by reason of his youth, if he was a youth, and inexperience in such matters, if he was inexperienced, did not know of the danger of coupling said car in its then condition.

"2. If the jury find that the coupling apparatus of the car which plaintiff was coupling to the train when injured was defective by reason of the link and pin being bent or misshapen and fast in the drawhead of said car, and that said defect rendered the coupling of said car to the train dangerous, then, although such defect was visible and the danger of coupling said car was apparent to one of mature years, or one accustomed to the coupling of cars, yet if the jury find that plaintiff was at the time young and inexperienced, and by reason of his youth and inexperience he was not aware of the danger to himself from the use of such coupling apparatus, then his right to recover in this action will not be defeated by the fact that said defect was visible and apparent and known to plaintiff."

The following are defendant's refused instructions also referred to in the opinion:

"1. Under the pleadings and evidence in this cause the jury will find for the defendant.

"2. The jury are instructed that when plaintiff undertook the duties of brakeman on defendant's train, under the circumstances detailed by him in evidence, he contracted with defendant to have ordinary skill and information concerning such duties, and if the jury believe that he was injured by reason of not having such ordinary skill and information he cannot recover in this case."

Ramey & Brown and *H. J. Alley*, for the appellant.

(1) When respondent undertook the duties of brakeman on appellant's road there was an implied contract on his part that he possessed the requisite skill,

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and was competent to discharge the duties for which he was employed. For that reason appellant's second instruction should have been given. *Parker v. Platt*, 74 Ill. 430; *Waugh v. Shank*, 20 Penn. St. 130; Wood on Master & Servant [2 Ed.] 166-7. (2) When respondent entered into appellant's employ as a brakeman he assumed all the risks and hazards incident to the employment, and he cannot recover for injuries resulting to him therefrom. *Railroad v. Flanigan*, 77 Ill. 365; *Patterson v. Railroad*, 76 Penn. St. 389; *Railroad v. Elliott*, 1 Cold. (Tenn.) 612; *Priestly v. Fowler*, 3 M. & W. 1; Wood on Master and Servant, p. 672, and cases there cited. (3) When the servant has knowledge of the defect, or it is patent, so that he has but to use his senses to discover it, and he voluntarily uses the defective appliance and injury results, he cannot recover. *Nolan v. Shickle*, 79 Mo. 336; *Albridge, Adm'r, v. Furnace Co.*, 78 Mo. 559; *Foley v. Railroad*, 48 Mich. 622; s. c., 42 Am. Rep. 481; Wood on Master and Servant, *supra*, sec. 335, pp. 696-7, and cases cited; *Atlas Engine Works v. Randall*, 100 Ind. 293. (4) The fact that the servant is a minor does not change the rule. He is bound by the same rules in reference to assent to and waiver of risk that an adult is. *Gartland v. Railroad*, 67 Ill. 498; *Railroad v. Elliott*, 1 Cold. (Tenn.) 612; *King v. Railroad*, 9 Cush. (Mass.) 112; *Brown v. Maxwell*, 6 Hill (N. Y.) 595; *Murphy v. Smith*, 19 C. B. (N. S.) 361. And the only effect that his age can have is that it is a circumstance that may properly be considered in determining whether or not respondent knew, or by exercising ordinary care could have known, of the risk arising from the use of the defective appliances. *Fones v. Phillips*, 37 Ark. 17; *Rummell v. Dillworth*, 2 Atl. Rep. 355; *Railroad v. Smith*, 9 Lea (Tenn.) 685. (5) The law presumes that the master has discharged his duty to the servant and that he is not at fault or negligent. Therefore the burden is on the respondent to

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rebut this presumption by showing: (*a*) That the master has been guilty of negligence in reference to the link and pin mentioned in their petition, which subjected the servant to danger and risk not in the ordinary scope of his employment, and that this negligence was the direct and proximate cause of the injury. Shearman & Redfield on Negligence, sec. 8; *Id.*, sec. 12; Wood on Master and Servant, sec. 382, p. 768-9-70; *Harlan v. Railroad*, 65 Mo. 22-25; *Stepp v. Railroad*, 85 Mo. 229, 233; *Powell v. Railroad*, 76 Mo. 80; *Moberly v. Railroad*, 17 Mo. App. 518; *Railroad v. Notyki*, 66 Ill. 455; *Wallace v. Railroad*, 74 Mo. 594; *Holman v. Railroad*, 62 Mo. 562-564; Shearman & Redfield on Negligence, [3 Ed.] sec. 99; *Covey v. Railroad*, 86 Mo. 635; *Elliott v. Railroad*, 67 Mo. 272; *Hicks v. Railroad*, 65 Mo. 34; *Randall v. Railroad*, 65 Mo. 325; *McDermot v. Railroad*, 87 Mo. 285. (*b*) That the respondent did not know of the defects and the danger incident to the use of said defective appliances, and would not, by the exercise of ordinary care on his part, have known it. *Devanny v. Pepper*, 12 Mo. 588; *Albridge, Adm'r, v. Furnace Co.*, 78 Mo. 559; *Keegan v. Kavanaugh*, 62 Mo. 230, 232; *Cook v. Railroad*, 24 N. W. Rep. 311: Wood on Master and Servant, *supra*, p. 769; *Buzzell v. Mfg. Co.*, 48 Me. 113. (6) There is no evidence in this case that respondent's youth affected his ability to appreciate the hazard incident to the use of the coupling in the condition described in the evidence, and it was error to submit that question to the jury. *White v. Chaney*, 20 Mo. App. 389; *Cottrell v. Spies*, 23 Mo. App. 35; *Skyles v. Bollman*, 85 Mo. 35. For the foregoing reasons appellant's instruction in the nature of a demurrer to the evidence should have been given, and all the instructions asked by respondent refused.

Hyde & Orton, for the respondent.

(1) The coupling apparatus was defective and dangerous. This question was submitted to the jury and

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found in his favor, and this unsafe condition was found to be the failure of defendant to use reasonable care to keep the coupling in safe condition, and that plaintiff received the injury by reason of the unsafe condition of the coupling. And the jury further found that the boy was at the time using reasonable care, and that he was a youth and inexperienced in such matters, and by reason of his youth and inexperience he did not know the danger of using the coupling in its then condition. (2) Contributory negligence, if relied on as a defense, unless shown by the proof of the plaintiff, is for the defense to show. Every element of this defense, not appearing in plaintiff's evidence, is to be shown by defendant. The plaintiff is not required to negative any fact that might, if proven, show him guilty of contributory negligence. He is not required to show that he was not the car inspector or repairer. If he was precocious, and for that reason ought to have known the danger, it is for defendant to show that fact and have it submitted to the jury. *Lloyd v. Railroad*, 53 Mo. 509; *Petty v. Railroad*, 88 Mo. 306; *Stephens v. Macon*, 83 Mo. 345; *Parsons v. Railroad*, 94 Mo. 294; *Huckshold v. Railroad*, 90 Mo. 548. (3) It was the duty of defendant to furnish cars that were reasonably safe for use by plaintiff, and to keep them safe. This is an ever-present duty, and its neglect is a continuing neglect, running with the cars. *Parsons v. Railroad*, 94 Mo. 286; *Tobler v. Railroad*, 93 Mo. 79; *Bran v. Railroad*, (53 Iowa, 595,) 36 Am. 243. (4) Contributory negligence cannot be imputed to plaintiff unless he knew, not only that the link and pin were fast, but he must have known the risk and danger resulting from that defect. There is a broad distinction between knowing the actual condition of the coupling and knowing the risk or danger resulting therefrom in its use. No evidence was offered by defendant, and none was produced by plaintiff, that he knew the peril he was in, in using this dangerous coupling. The undisputed evidence of the boy was that he did not know this danger, and

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no facts were shown from which such knowledge could be inferred. From his brief experience as a brakeman, even if he had been an adult, we would infer that he did not know the danger. But when we consider, in addition to his brief experience as a brakeman, that he was a boy only seventeen, the inference that he did not know the danger is still stronger. So there could have been no conclusive presumption to justify the court in taking the case from the jury. *Dowling v. Allen*, 74 Mo. 14; *Dowling v. Allen & Co.*, 88 Mo. 293; *Colbert v. Rankin*, 13 Pacific (Cal.) 491; *Cook v. Railroad*, 24 N. W. Rep. (Minn.) 311; *Russell v. Railroad*, 20 N. W. Rep. (Minn.) 147; *Car Works Case*, 27 N. W. Rep. (Mich.) 662; *Parkhurst v. Johnson*, 15 N. W. Rep. (Mich.) 107; *Carver v. Christian*, 26 N. W. Rep. (Minn.) 8; *Behm v. Armour*, 15 N. W. Rep. 806; *Rummell v. Dillworth, Porter & Co.*, 2 Atlantic (Penn.) 35; *McGowen v. Smelting Co.*, 9 Fed. Rep. (U. S. Cir. Col.) 861; *Watkins v. Goodall*, 138 Mass. 553; *Looney v. McLean*, 129 Mass. 33; *Railroad v. Frawley*, 9 N. E. Rep. (Ind.) 594, and cases therein cited; *White v. Worsted Works*, 11 N. E. Rep. (Mass.) 75; *Grizzle v. Frost*, 3 Frost and Final, 622; *Clark v. Holmes*, 7 N. F. and H. 937; *A. Goins v. Railroad*, decided at the last term of this court. (5) The jury found that the appliance was dangerous and that plaintiff was a youth and inexperienced, and did not know the danger of using the defective coupling. In such case there was no implied contract that he was a skilled brakeman. Defendant, when it transferred him to the rock train as a brakeman, knew that he was not a skilled brakeman. *Dowling v. Allen & Co.*, 74 Mo. 17, and 88 Mo. 293. (6) The evidence showed that "Mr. Hough was the conductor of the rock train." He "was the foreman and boss," and Albert worked under his orders. This would constitute him the *alter ego* of the defendant. *Dowling v. Allen & Co.*, *supra; Moore v. Railroad*, 85 Mo. 588; *McDermot v. Railroad*, 87 Mo. 287; *Clowers v. Railroad*, 21 Mo. App. 213. (7) The second instruction

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asked by defendant and refused by the court did not state the law of this case where a boy in defendant's employ in a service that he could do safely was transferred to a service of which he was ignorant, and to work with defective and dangerous appliances. (8) The first instruction for the defendant was as favorable to defendant as it could ask. If knowing the condition is correct, but, if it is construed to mean that the moment when Albert made the coupling he knew the link and pin fast without regard to whether he knew the danger of making the coupling then the plaintiff could not recover, the proposition is not correct. Defendant cannot complain of the unsoundness of this instruction.

GILL, J.—The nature of this case can best be understood by reference to the pleadings, the substance of which is here given. This suit was begun March 17, 1887. The second amended petition, on which it was tried, states the minority of plaintiff, the appointment of the guardian, the incorporation of defendant and its ownership and operation of the railroad on which the accident subsequently occurred, and proceeds as follows:

"That on and prior to said day, and at the time of receiving the injury hereinafter mentioned, this plaintiff was employed and hired by said defendant as a common laborer on its construction train, located in said county, and was receiving only the wages of a common laborer and not the wages of a brakeman, and, being so employed and hired, said defendant and its foreman and conductor, under whom plaintiff was working, transferred plaintiff to another train of defendant engaged in hauling rock for defendant in said county, and directed and ordered plaintiff to perform the duties of brakeman on said last-mentioned train; the said defendant and its foreman and conductor then and there well knowing that plaintiff was young and ignorant and

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inexperienced as to the duties of a brakeman; and plaintiff, in obedience to said orders and directions, was performing the duties of brakeman as aforesaid when he received the injury hereinafter mentioned.

"That on said seventeenth day of August, 1886, at Mercer county, Missouri, plaintiff was injured while discharging the duties of brakeman as aforesaid in coupling said cars, without carelessness or negligence on his part, but through and in consequence of the carelessness and negligence of said defendant in this, that it negligently and carelessly provided, used and permitted and directed to be used, in coupling its said train and cars, a certain crooked and misshapen link and pin in the forward end of one of its cars as the same was used in said train, which said link and pin, by being crooked and misshapen, both became and were, and for a long time before said day had been, fast in the forward drawhead of said car as the same was used and run in said train; which said link and pin, by reason of being crooked and misshapen, and fast in the front drawhead of said car as aforesaid, as the said car was used and made up in said train, then and there became and was a very unsafe and dangerous coupling; and, that in consequence of said unsafe and dangerous coupling, link and pin, carelessly and negligently used, provided and maintained by the defendant as aforesaid, plaintiff, being by said defendant and its foreman and conductor under whom plaintiff was working thereto directed and commanded, in attempting to couple said car having said unsafe and dangerous coupling pin and link to said moving train, backing up to said car for that purpose, had his right hand caught and crushed by the drawheads of the said cars he was attempting to couple, thereby causing great and permanent injury to plaintiff's right hand, crushing and causing him to lose and necessarily have amputated two fingers and a part of a third finger, and a considerable part of the palm of his

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said right hand, so he became sick, sore and disordered, and so remained for six months, and was, and is and ever will be, permanently disabled in said hand, and prevented and hindered from making a support and from attending to his own ordinary business and occupation.

"That the said unsafe and dangerous condition of said link, pin and coupling was, for a long time before plaintiff was injured thereby, to-wit, for ten days, well known to said defendant and its said foreman and conductor who had charge of said train and cars and of plaintiff, and under whom plaintiff was working, or by the exercise of ordinary care and diligence said condition could have been known to defendant and said conductor and foreman, but said defendant and its said foreman and conductor, well knowing of said unsafe and dangerous coupling, link and pin, and of the defects existing therein, and that the same was very unsafe and dangerous to use in the manner aforesaid, or after said condition, by ordinary care and diligence could have been known to them, the defendant carelessly and negligently failed, neglected and refused to repair, or change, or suspend the use of the same, and negligently and carelessly neglected and refused to inspect said car or train to ascertain the defective or dangerous condition of the same.

"That plaintiff was young, ignorant and inexperienced in such matters, and only knew that said link and pin were fast in the drawhead of said car, but had no knowledge and was wholly ignorant of the unsafe and dangerous condition of the same, and did not know that the condition of said link and pin, and its location in the front drawhead of said car, as used and run in said train, rendered it hazardous, dangerous or unsafe to use in coupling cars, as plaintiff was by said defendant and its foreman and conductor, under whom plaintiff was working, ordered and directed to do."

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The petition lays the damage at twenty-four hundred and ninety-five dollars, for which judgment is asked.

The answer, after denying all the allegations of the petition not specifically admitted, proceeds:

"Defendant admits—

"1. That said Albert Goins was in the employ of the defendant as brakeman at the time and place stated in said petition.

"That said Albert Goins received injuries in coupling defendant's cars at about the time and place stated in said petition. But said defendant says that the injuries received by said Goins were occasioned by his own negligence, and not by any fault or negligence on the part of defendant. And further answering said defendant says that said Albert Goins, at all times mentioned in said petition, had full and complete notice of the condition of the link; pin and coupling apparatus referred to in said petition, and had then and there full and complete notice and knowledge of all dangers and hazards attendant upon using said link, pin and coupling apparatus. But, that notwithstanding said notice and knowledge, said Albert Goins, at the time stated in said petition, carelessly and negligently attempted to couple said cars without using any care or caution whatever in so doing, whereby he received the injuries referred to in plaintiff's said petition."

Plaintiff by his reply denied the acts of contributory negligence set up in the answer.

The case was submitted to a jury, under instructions from the court, a verdict and judgment was rendered for plaintiff, fixing his damages at seventeen hundred dollars; and, after an unsuccessful motion for a new trial, the defendant has appealed to this court.

I. After reading and considering the evidence adduced at the trial, we regard it as tending to prove substantially all the allegations of the foregoing

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petition, and shall therefore confine ourselves to the law as declared in the instructions by the court.

The law defining the respective duties of master and servant, in this class of cases, is more easily understood than applied to individual cases. On the one hand the master is charged with reasonable care to provide safe and proper machinery and appliances for the use of the servant, and is charged too with ordinary care to keep such appliances in reasonable repair. This care, incumbent on the master, is only such as prudent and careful men engaged in such work would be expected to, and do, exercise. On the other hand, the servant, in entering upon the employment, assumes all risks, or perils, ordinarily incident to the nature of his engagement. The servant has the right to rely on the master's ordinary care that reasonably safe appliances are provided, and that they are kept in a proper state of repair. If then the master is remiss in his duty—fails, for instance, to use proper care in providing reasonably safe machinery, or fails in the exercise of due care in repairing defective appliances, and the servant, while exercising ordinary care, is injured by reason of the master's neglect, then the servant may recover. The existence of negligence on the part of the master, however, does not warrant recovery by the injured servant, if the injury resulted proximately from the want of ordinary care by the servant.

If the master supply defective machinery, and the servant know it, and know of the dangers to which he is exposed by reason thereof, and yet continue his work without objection, then the servant cannot recover for injuries thereby and thereafter received. If the risk is such as to be obvious to any one, using his senses, then it will be presumed, ordinarily, that the servant took notice thereof, and, by continuing the work without objection, he assumes the risk of such defective machinery. *Aldridge's Adm'r v. Midland Furnace Co.*,

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78 Mo. 559; *Keegan v. Kavanaugh*, 62 Mo. 232; *Dowling v. Allen*, 74 Mo. 13 and 88 Mo. 293; *Covey v. Railroad*, 86 Mo. 635; *Smithy v. Railroad*, 69 Mo. 32; *Porter v. Railroad*, 71 Mo. 66.

While knowledge by the servant of the defect in the machinery will, ordinarily, preclude recovery for injuries thereby inflicted, yet, in the language of the supreme court, in *Dowling v. Allen*, *supra*, "we think the doctrine equally well settled by the authorities, that although the machinery, or that part of it complained of as especially dangerous, is visible, yet if by reason of the youth and inexperience of the servant, he is not aware of the danger to which he is exposed in operating it, it is the duty of the master to apprise him of the danger," etc. "A servant knowing the fact may be utterly ignorant of the risks." (74 Mo. 17.) So it may be well said, in the case at bar, that mere knowledge on the part of this boy Albert (then seventeen years old) that the drawhead, or coupling appliances, were defective would not defeat recovery, if because of his youth and inexperience in that particular business, he did not apprehend the probable danger attending the use of such defective appliances. On the law as declared in *Dowling v. Allen*, plaintiff's instructions numbered one and two were properly given by the court. Indeed we see no reason to condemn any of the instructions given. They fully and fairly declared the law as applicable to the case both for the plaintiff and defendant.

II. Under the circumstances attending the employment of Albert Goins, the court properly enough refused to give defendant's instruction numbered two. If the boy did not have "ordinary skill and information" in "braking" this defendant has no right to complain thereat. He was hired to the company as a "shoveler" on the gravel train, and worked in that position for more than a year just prior to this injury.

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About three weeks before getting hurt, the company's "boss," or person in charge of the boy, took him away from the "gravel train" and put him to "braking" on the "rock train," and continued him, too, on the same pay as "shoveler." The defendant then had full knowledge of the boy's "skill and information" as brakeman and cannot now defend this action by showing his want of such skill.

Without further discussion of points urged by appellant's counsel, we hold that this case was fairly tried and submitted to the jury on proper instructions, and shall therefore affirm the judgment. All concur

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JOHN C. BENDER, Appellant, v. SAMUEL M. MARKLE, Respondent.

Kansas City Court of Appeals, May 20 and 30, 1889.

1. **Referee**: FINDING OF, IN ACTIONS AT LAW AND SUITS IN EQUITY. In actions at law the finding of a referee is considered as a special verdict and appellate courts will not weigh the evidence for the purpose of overturning it; but in equity cases, where the parties have not a right to a trial by jury, a referee's finding may be reviewed on the evidence taken.

2. **Partnership**: ACTION BETWEEN PARTNERS AFTER DISSOLUTION: EQUITABLE, WHEN. Notwithstanding there may be a settlement between partners of matters theretofore existing and a dissolution, the partnership still continues in a qualified sense, for the purpose of paying and collecting partnership claims, and adjusting partnership affairs and partnership relations which existed or had their inception prior to the dissolution; and an action by one partner against another for a sum alleged to be due plaintiff on account of partnership matters transpiring since the dissolution is an action of equitable cognizance, and this, too, though there is no prayer for an accounting, as the relief will be granted in accordance with the facts averred and proved.

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3. ———: DISSOLUTION: LIMITATION. It does not follow that the dissolution of a partnership sets the statute of limitation in motion, but as long as there are debts to be paid or credits to be collected, the statute of limitations does not begin to run, as to the account between the partnership and any of its members, and the agency or trusteeship of the several partners would continue so as to prevent the statute from running till it was shown to have been renounced on the one side or not recognized upon the other.

4. **Referee**: FINDING OF, AS TO LAW AND FACTS: WHAT AND WHEN SET ASIDE. While in law actions the finding of the referee, as to the facts, is a special verdict, yet if his conclusions of law from such facts are erroneous, such conclusions will be set aside.

5. **Mortgage or Conditional Sale**: INTENTION: MAXIM: DOUBT. Whether a conveyance absolute on its face is a mortgage or a conditional sale is to be ascertained by learning the intention of the parties, and is fixed at its inception and is not changed by lapse of time, the maxim, "once a mortgage, always a mortgage," applying; and, in case of doubt, such doubt should be resolved in favor of the instruments being intended as a mortgage.

6. **Mortgage**: CREDIT OF PROCEEDS OF IRREGULAR SALE ON NOTE: LIMITATION: AMOUNT OF CREDIT. Where the holder of a conveyance intended as a mortgage sells the property without foreclosure proceedings and credits the proceeds on the note intended to be secured by such conveyance, such credit will operate as a payment made by defendant so as to prevent the bar of the statute of limitations, though the defendant may not be bound by the amount of the sale and will be entitled to a credit equal to the value of the land so irregularly sold.

On motion for rehearing.

1. **Limitation**: PARTIAL PAYMENT: PRIMA FACIE CASE. The holder of a note makes a *prima facie* case against the statute of limitations by merely showing a part payment; and if such payment is made without intending it should operate as an acknowledgment as to the residue, such lack of intent must be evidenced by some act of the payor and should be made to appear by him.

2. ———: PAYMENT, BY WHOM MADE: AGENCY OF MORTGAGEE. Such payment is sufficient to prevent the running of the statute if made by any one authorized to make it, and every mortgagee may be said to have an order from the mortgagor, either in express terms or by operation of law, that the proceeds of the sale of the land shall be applied as a payment on the note.

3. ———: REASONABLENESS OF TIME OF SALE. As to whether the question of the reasonableness of the time of the sale of the land by plaintiff might be a proper subject of inquiry, *quaere*.

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Appeal from the Buchanan Circuit Court.—Hon. O. M. Spencer, Judge.

Reversed and remanded.

Burr & Robinson, for the appellant.

(1) The first count in the petition in this case shows an action for an accounting between partners, although the prayer would seem to be in *assumpsit*. The allegations in the pleadings, and not the prayer for relief, determine the nature of the action; and under our statutes the court may give any relief consistent with the allegations in the pleadings, without regard to what is asked for. *Henderson v. Dickey*, 50 Mo. 161; *Wright v. Babb*, 53 Mo. 340; *White v. Rush*, 58 Mo. 105; *Bank v. Evans*, 51 Mo. 335; *Mason v. Black*, 87 Mo. 329. (2) The statute limiting actions on mutual, running and current accounts does not apply as between partners, on a suit in equity for an accounting. *Massey v. Tingle*, 29 Mo. 437; *Condrey v. Gilliam*, 60 Mo. 86; *Tutt v. Cloney*, 62 Mo. 116–121; *Alexander v. Clark*, 83 Mo. 481; *Mudd v. Bast*, 34 Mo. 465–468; *Hammond v. Hammond*, 20 Ga. 556. (3) On mutual, open and current accounts, generally, the statute only begins to run at the date of the last adverse charge. R. S. 1879, sec. 3233. (4) In equity proceedings the appellate court will review the findings of the referee where the evidence is embodied in the record. *Prendergast v. Eyermann*, 16 Mo. App. 387; *Ely v. Ownby*, 59 Mo. 437–441; *O'Neill v. Capelle*, 62 Mo. 202; *Donovan v. Barnett*, 27 Mo. App. 460; *Hardware Co. v. Walter*, 91 Mo. 484. (5) In actions at law the conclusions of law arrived at by the referee, as to facts found, may, if erroneous, be set aside and the law properly applied by the appellate court. *Goetz v. Piel*, 26

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Mo. App. 634. (6) The land given as security in this case is in the nature of a collateral security, and the application by the creditor of the proceeds of a collateral security, deposited by the debtor, will operate like a payment by the debtor to remove the bar of the statute of limitations against the principal debt. *Stornberger v. Lee*, 45 Am. Rep. (Neb.) 106; *Haven v. Hathaway*, 20 Me. 345; *Whipple v. Blackington*, 97 Mass. 476; 3 Ran. Com. Paper, sec. 1623; *Joliet I. Co. v. Scioto F. B. Co.*, 25 Am. Rep. (Ill.) 341; *Wheeler v. Newbould*, 16 N. Y. 392.

Woodson & Woodson, for the respondent.

(1) The first count in the petition is an action of *assumpsit*, based upon the theory that there was an absolute dissolution of the partnership and settlement in August, 1871, and that all debts contracted after that were individual matters. Having tried the case upon that theory below, he cannot abandon it, and proceed upon a different theory in this court. *Nance v. Metcalf*, 19 Mo. App. 183; *Schlicker v. Gordon*, 19 Mo. App. 479; *Corn v. Cameron*, 19 Mo. App. 573; *Wright v. Sanderson*, 20 Mo. App. 534; *Armstrong v. Bank*, 62 Mo. 59. (2) Even if this was an action for an acccounting, where the defendant denies the fact of co-partnership, if the demands are such that they might be prosecuted in actions for "money had and received," and "account stated," a referee is improper, as the issue is one for the jury. According to this rule, this case was not referable, except by agreement of the parties, which was done. *Silver v. Railroad*, 5 Mo. App. 381; s. c., 72 Mo. 194. (3) When the partners themselves have cast up the items, and agreed upon the state of the account and the resulting balance either way, there is no further account to be taken, unless upon a suggestion of fraud, mistake, or omission operating to falsify their conclusions; and the court cannot interfere with the result

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thus settled by the parties. *Silver v. Railroad*, 72 Mo. 194; s. c., 5 Mo. App. 381. (4) If one partner collect a portion of the claims due the firm, and fail to account for the amount so collected in the partnership settlement, he may be sued by the other partner without any impeachment of the settlement or re-adjustment of the partnership accounts. Partners are not forbidden to sue each other at law, merely because they have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of the partnership accounts. *Russell v. Grimes*, 46 Mo. 410. (5) But conceding that this is, as appellant contends, "an action for an accounting between partners," and that it is not barred by the statute of limitations, yet the judgment must be affirmed as to the first count, because the referee found for the defendant, because "plaintiff has failed to establish the allegations in said count." The report of the referee is conclusive as to questions of fact, if there is any evidence to support it. *Gamble v. Gibson*, 75 Mo. 326; *Father Mathew v. Fitzwilliams*, 84 Mo. 406; s. c., 12 Mo. App. 445. (6) Even in equitable proceedings, this court will defer somewhat to the trial court in matters of fact, "when the advantages of the latter are so great in regard to observing the manner and demeanor of the witnesses," etc. *Bartlett v. Newfried*, 94 Mo. 529 and 530, and cases cited. (7) The second count in the petition is unquestionably an action at law, and the referee found for defendant thereon, "because plaintiff failed to show any authority to make the credit on the back of the note. The finding of the referee on this point is conclusive upon this court. *Gamble v. Gibson*, 75 Mo. 326; *Father Mathew v. Fitzwilliams*, 84 Mo. 406; s. c., 12 Mo. App. 445. (8) The evidence shows, and the referee found, that when Markle executed the note to plaintiff, he intended to secure the same, until the note matured, by giving an equitable lien only upon his interest in the Peter Bender farm, and, if not paid at maturity, then Dr. Richardson under

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the agreement, who held the legal title to the land, was to convey the absolute title thereof to Bender, in payment and satisfaction of said note. This constituted the whole transaction, conditional sale, which became absolute when Markle failed to pay the money when due, and the conveyance was made to Bender. *Turner v. Kerr*, 44 Mo. 429; 2 Delvin on Deeds, secs. 1119, 1120, and cases cited; 1 Jones, Mortgages [3 Ed.] secs. 269, 270. After this no debt existed. *Stowey v. McMurray*, 27 Mo. 113; 2 Delvin on Deeds, secs. 1119, 1120, and cases cited; 1 Jones, Mortgages, secs. 269, 270. (9) But, admitting that the transaction and intention of the parties was to create a mortgage upon the land to secure the note, Bender being the mortgagee, he had no right under the contract, or independent of it, to sell the land at private sale, and apply the proceeds, or any part thereof, upon the note. Appellant does not contend that there is anything in the contract that authorizes him to do so. And even if it had so provided, that part of the contract would have been void, because the mortgagor can never contract away his "equity of redemption," and the only way in this world, by which the mortgagee can get shut off that "equity of redemption," sell the land and apply the proceeds thereof in satisfaction of the note, is by a "suit of foreclosure." (10) All the cases, cited by appellant in his argument, are cases where there was a dissolution of the partnership only, and not a dissolution and settlement as is the fact in this case. Besides this, Bender's account shows no such items; he must recover upon his petition, if at all, and not upon the answer of defendant. *Perry v. Barret*, 18 Mo. 140; *Magruder v. Adams*, 4 Mo. App. 133; *Gurly v. Railroad*, 93 Mo. 450.

Ellison, J.—Plaintiff and defendant were formerly partners engaged in prosecuting and collecting claims against the United States and dealing in real estate. They dissolved in 1871, after a settlement of affairs up

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to that time. The first count in this action is for a sum alleged to be due plaintiff on account of matters transpiring since the dissolution.

The second count is on a note executed by defendant to plaintiff, January 11, 1873, for four hundred dollars, and on which plaintiff entered a credit, July 1, 1878, on account of sale of land, which he held under a deed which defendant directed made to him.

The answer was a general denial and the statute of limitations as to both counts. The matter was referred to a referee, whose finding was that the statute of limitations barred the action in both counts, and that on the first count plaintiff failed to establish the allegations of the petition. The report and finding was approved by the court below and plaintiff has brought the case here.

It is important to determine whether the first count is an action at law or in equity. Defendant says it is an ordinary action *in assumpsit*, while plaintiff claims it to be in equity for an accounting. If an action be at law, in which the parties have a right to a jury, the finding of the referee, to whom the matter is referred by agreement of parties, will be considered as a special verdict, and appellate courts will not weigh the evidence for the purpose of overturning his finding. But if it be an equity case, the parties have not a right to a trial by jury, and, if in such case the court refers the case to a referee, his finding may be reviewed on the evidence taken.

The parties agree as to the formation and object of the partnership and as to a dissolution and settlement in 1871, in which there was a balance found to be due plaintiff of $88.45. There was then pending and undetermined a large number of claims in which they were entitled to fees, and in the prosecution of which expenditures would be required. It was agreed that plaintiff should continue in business, prosecute the claims on hand, collect and receive the fees therefor, and keep an account of the receipts and disbursements, and of all

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moneys paid to defendant on account of said business, and also pay a certain note of seventy-five dollars, which defendant owed to the bank, and, as plaintiff alleges, repay himself for all such disbursements out of the fees to be collected and land to be disposed of, and if there was not enough realized therefrom defendant was to pay the balance due to plaintiff. Plaintiff was to charge nothing for his services in closing up the partnership business. Under this arrangement plaintiff says he received on fees and land sold $972.97, and paid out $1,330.52, leaving a balance due to him of $358. A large number of suits were pending against the firm at the time of the dissolution of the partnership, or were brought soon thereafter, in and about the defense of which plaintiff says he paid out for attorney's fees and other costs large sums of money, and that he collected certain claims or fees for the firm during all the years from 1871, up to July, 1885, and many of such claims and fees still remain uncollected and no settlement was ever had between them as to any of the business transacted by plaintiff after the dissolution of the partnership, in August, 1871. The plaintiff, acting for and on behalf of the partnership, or partners, in receiving and disbursing the moneys, claims not only to be a trustee of the firm, but that his transactions constituted a mutual, running and current account between them as to such receipts and expenditures on account of the partnership business, and that either partner could compel a settlement or accounting as to such unsettled business.

Defendant contends that the settlement was a full and final settlement of all the partnership affairs, past or prospective, and that there was no further partnership relation between them.

I am of the opinion that the first count must be regarded as an action in equity; there is no prayer for an accounting, but the body of the petition discloses that the action is for an adjustment of accounts between

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partners in relation to partnership matters which have arisen since the dissolution. It is well settled in this state that relief will be granted in accordance with the facts stated, regardless of what the prayer may be.

When properly understood, the testimony of each of the contending parties makes the first count a matter of equitable cognizance. It shows differences in regard to partnership affairs which require an accounting to adjust; this is the province of a court of equity. *Biddle v. Ramsey*, 52 Mo. 153. Both parties, it is true, agree, that in 1871 there was a dissolution, but, so they agree, that at that time there was a mass of undetermined partnership business, consisting of claims and fees uncollected, partnership interests in lands unsold, and a large number of suits pending against the partnership. Plaintiff, by the terms of their settlement, was to attend to these matters and necessarily should have kept an account which he could render to defendant.

Notwithstanding there may be a settlement between partners of matters theretofore existing and a dissolution, the partnership still continues in a qualified sense, for the purpose of paying and collecting partnership claims and adjusting partnership affairs and partnership relations which existed, or had their inception prior to the dissolution. Story on Part., sec. 325; *Condrey v. Gilliam*, 60 Mo. 86; *Mudd v. Bast*, 34 Mo. 465. It is not only in the power of a partner, after dissolution, to adjust such matters, but it is his duty to do so.

Regarding this case, then, as one in equity, we do not feel concluded by the finding of the referee, and are not fully satisfied with his findings as to plaintiff's claim, and as the cause is to be remanded for other reasons, we suggest, as was done in a similar case (*Carr v. Moss*, 87 Mo. 447), that the matter be re-examined.

The circumstances of the case, as developed by the testimony, do not justify the referee in finding the

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action in this count barred by the statute of limitations. I have already stated the duties devolving upon the former members of a dissolved partnership, and whether those duties were, by an arrangement between the parties, devolved upon the plaintiff alone can make no difference. The trustee relationship is shown to have been recognized by defendant at least, as late as June, 1886, as is shown by his letter of that date, viz.:

"JONESBOROUGH, Ark., June 5, 1886.

"*Mr. Bender*:—

"MY DEAR FRIEND:—I have been intending to ask you to look on our old books and make a list of the partnership claims that have been paid since I went out of the firm. They must be mostly paid by this time. Do this at your leisure so that we can make a settlement sometime this summer.

"Ever yours,

"[Signed] S. M. MARKLE."

It does not follow that a dissolution of a partnership sets the statute of limitations in motion. Duties pertaining to the partnership, as we have seen, may yet remain to be performed, and whether an account is barred will depend upon the circumstances of each case. *Massey v. Tingle*, 29 Mo. 437. The arrangement between these parties in regard to their past partnership affairs were such, that so long as plaintiff was fulfilling those duties by executing the trust reposed in him, he certainly would not have been permitted to have interposed the statute, had he been sued by defendant for an accounting. So, whatever right may have existed in either of them to call the other to an account during the currency of the time since the dissolution, it is certain they each acquiesced in the delay, and that neither can now 'invoke the protection of statute.' *Condrey v. Gilliam*, 60 Mo. 86.

The following extract from the case of *Hammond v. Hammond*, 20 Georgia, 556, is quite applicable to this

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case, and I am inclined to approve of all that is there said, with this additional remark, by way of qualification, that the agency or trusteeship would continue so as to prevent the statute from running till it was shown to have been renounced upon the one side, or not recognized upon the other. The court said:

"Each member of a partnership is its agent to do all of its business. A part of the business of every partnership is the payment of its debts and the collection of its credits. As long, therefore, as there are debts of a partnership to be paid or credits of it to be collected, there is a business of the partnership remaining to be done. There may be debts and credits of a partnership existing after a dissolution of it; and, as long as there is any business of a partnership remaining to be done, the agency of each partner, being, as it is, an agency to do the whole partnership business, continues.

"But, as long as an agency lasts, the statute of limitations does not begin to run, as to the matters of the agency between the principal and the agent; therefore, as long as there are debts of a partnership to be paid, or credits of it to be collected, the statute of limitations does not begin to run, as to the account between the partnership and any of its members.

"And when the statute does not run as to the account between the partnership and the members, it does not run as to the account between one partner and the other; for, in reality, that account is between, not one partner and the other, but between the partners and the partnership. He owes the partnership so much, the partnership owes him so much—not he owes the partners so much, the other partners owe him so much. His suit is against the partnership."

II. The second count is an action at law, and in such case, as I have stated, we will look upon the finding of facts by the referee as a special verdict; but, nevertheless, if the referee's conclusion of law from such

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facts is erroneous, such conclusion will be set aside; *Goetz v. Piel*, 26 Mo. App. 634. We shall therefore feel bound by the conclusion of the referee wherein he finds that defendant did not expressly agree that plaintiff should sell the land and enter the proceeds as a credit on the note. But as to whether plaintiff had that authority by reason of the relations existing between them by virtue of the deed, we will determine for ourselves.

The transfer of the land through Richardson from defendant to plaintiff was either a conditional sale or a mortgage. Defendant says it was a conditional sale, to become absolute, if the debt was not paid at maturity and thereby extinguish the debt. The facts fail to justify this contention. In the first place there was, as the note establishes, the undisputed relation of debtor and creditor between the parties.

If this relation continued, the transfer of the land must be regarded as a mortgage and not a sale, as, of course, a sale with the debt as a consideration would have extinguished the debt. In this connection it may be stated as a circumstance, that plaintiff has retained the note without objection from defendant.

At about the time of the execution of the note defendant gave to plaintiff the following letter addressed to the party in whom the title to the land was, viz.:

"ST. JOSEPH, MO., Jan. 10, 1873.

"*Dr. R. P. Richardson, St. Jo., Mo.*

"DEAR SIR:—I have borrowed four hundred dollars from J. C. Bender, due one month after date, if not paid when due please deed my interest in the Peter Bender homestead to John W. Bender or Ella Bender as he may direct, being the land in Holt county, Mo., described as follows: West half (W. 1-2) of southwest quarter of section ten (10), in township (61) of range (39).

"(Signed) S. M. MARKLE."

Defendant testified that he and plaintiff agreed that if he paid the note within a certain time (he thinks

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three or four months), plaintiff was to convey back to him. It is apparent that the transfer, at the start, was treated as a security for a debt. The character of such transaction is ascertained by learning the intention of the parties, and is fixed at its inception and is not changed by lapse of time. 1 Jones, Mortg., secs. 258, 263. This is but a recognition of the maxim: "Once a mortgage, always a mortgage."

But if we should concede so much as to say the matter was left in doubt, such doubt would be resolved in favor of the instrument being intended as a mortgage. *Ib.*, sec. 279; *Turner v. Kerr*, 44 Mo. 429.

Regarding the deed, then, as a mortgage, though absolute in form, we would have no trouble in holding that if there had been a regular foreclosure, plaintiff would have had the right to place the proceeds of such sale on the note as a credit; and such would necessarily be held to have been the original intention of the defendant when he executed the note and ordered the deed. But as plaintiff has sold the land at private sale without authority, it is quite difficult to say what effect such sale and the entry of the proceeds on the note has by way of interrupting the run of the statute.

The deed was given with the intention on the part of the mortgagor, that any proceeds arising from the land should reduce, *pro tanto*, the note. If the mortgagee gets possession, the rents and profits of the premises go to the liquidation of the note, as such must necessarily have been the intention of the parties.

So if the plaintiff in this case had had possession of the property before sale, unquestionably he would have had the right, and it would, moreover, have been his duty to apply the profits of such possession as a credit on the indebtedness. And when in addition to these considerations we reflect that though the defendant is bound by the sale, if made to a party ignorant of the real character of plaintiff's deed, he is not bound, as between him and plaintiff, as to the amount of the sale, and that he is

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entitled to a credit equal to the value of the land thus irregularly sold (1 Jones, Mortg., sec. 341), and that therefore he cannot be harmed by the mode of sale, we are inclined to hold that the credit will operate as a payment made by defendant so as to prevent the bar of the statute.

It follows that the judgment should be reversed and the cause remanded. All concur.

ON MOTION FOR REHEARING.

ELLISON, J.—The case of *Worley v. Dryden*, 57 Mo. 226, cited in the motion for rehearing, has no application. In this case, both parties agree that the deed was not to be considered an absolute deed. Defendant testified that he valued the land at more than the amount of the note. And he says, "I agreed with Bender that if I paid this four hundred dollars within a certain time, I think three or four months, he was to *redeed* it to me; if not he was to keep the land." On cross-examination defendant further said, "I drew an order on Richardson to transfer the land to Bender at the same time that I gave the note. I had the privilege of *redeeming* at a certain time." "I deeded the land absolutely, but *reserved the right to redeem*. I knew he had the note but never took it up or demanded it of him. It was his land after a certain time ran out. I had the right for a certain time to pay the note and redeem the land." See *Wilson v. Drumrite*, 21 Mo. 325.

The dispute between the parties at the trial was whether the deed was a mortgage or conditional sale; when such is the question, the doubt is resolved in favor of its being a mortgage. Authorities in original opinion.

There is no question but that part payment of a note takes it out of the statute, that is, the limitation will only begin to run from the day of payment. This is true, if the payment made by the party sought to be

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held, whether it be made before or after the note is barred. *Shannon v. Austin*, 67 Mo. 485. From the mere fact of payment of a part of the debt, nothing more appearing, the law presumes an acknowledgment or new promise.

In this state the holder makes a *prima facie* case by merely showing a part payment without going further.

If the partial payment is made without intending it should operate as an acknowledgment as to the residue, such lack of intent must be evidenced by some act of the payor and should be made to appear by him. Notwithstanding the statute requires a new promise to be evidenced by a writing signed by the party sought to be charged (secs. 3248, 3249); yet section 3250 declares that nothing in said sections shall in any manner alter the effect of "a payment of any principal or interest made any person."

So it is held that the payment by one of two joint obligors, made before the obligation is barred, will take the case out of the statute as to both. *Craig v. Callaway Co.*, 12 Mo. 94. The payment of interest by one of several promisors is held to be an acknowledgment as to all. *Callaway v. Johnson*, 51 Mo. 31. And, if the payment be made by a co-maker before the bar attaches, it will take the case out of the statute as to both. *Bennett v. McCause*, 65 Mo. 194. If made by one partner, though after dissolution, it will take the case out of the statute as to the co-partner. *McClurg v. Howard*, 45 Mo. 365. So, if the payment be made by the administrator of one of the joint promisors it keeps the debt alive as to all. *County of Vernon v. Stewart*, 64 Mo. 408.

These cases are cited to show that it is not necessary that the party sought to be held should himself make the payment, and that if it is made "by any person authorized to make it," it is sufficient. *Bennett v.*

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McCause, supra. Whatever may be the view in other jurisdictions, we must follow the rule as laid down in this state to its logical and natural end.

As before stated, if payment is made, nothing appearing to show a contrary intention, the payment alone is sufficient to prevent the statute barring the claim.

Payment of a portion of an ascertained debt is an admission that the whole is then due. *Haven v. Hathaway*, 20 Maine, 345; 97 Mass. 476. It is equally clear that a party need not pay by his own hand, he may do so by his agent. *Ib.* And this agent may be the payee himself, as where the payor gives the payee collateral.

It was so where goods were given to the payee to be sold and the proceeds applied on the note. *Potter v. Blood*, 5 Pick. 94. And where another note was delivered to the payee to collect and apply the proceeds. *Somberger v. Lee*, 14 Neb. 198; *Haven v. Hathaway, supra;* 97 Mass. 476. When an ordinary mortgage or deed of trust is made to secure the payment of the mortgagor's promissory note, I am wholly unable to see why the proceeds of a sale under such mortgage is not a payment on the note. Now, by whom is the payment made? Certainly it is not made by an intruding stranger. It is made by the mortgagor's agent who acts in obedience to the instruction which his principal has given him in the mortgage. Every mortgagee may be said to have an order from the mortgagor, either in express terms or by operation of law, that the proceeds of the sale of the land shall be applied as a payment on the note. A payment thus made is not an involuntary payment. It is a payment in obedience to the direction of the payor, voluntarily given when he executed the mortgage. Just as much the voluntary act of the payor as when he assigns other notes as collateral with directions to apply the proceeds on the principal note.

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We mean our remarks to apply only to a case where the agent (the mortgagee or trustee) has made the payment on a note not yet barred, for such agent's authority to acknowledge an obligation already dead might present a different question.

As stated in the original opinion our chief difficulty has been over the manner of the sale of the property, but the conclusion we reached is the opinion we entertain, as the result to be deduced from the authorities in this state.

While we do not wish to be understood as standing committed in the matter, we will suggest in view of a retrial of the cause, that a question of the reasonableness of the time of the sale of the land by plaintiff might be a proper subject of inquiry. See *Potter v. Blood*, 5 Pick. 94.

The motion for rehearing is overruled. All concur.

JOHN H. BLACK *et al.*, Respondents, v. URIAH A. ROSS *et al.*, Appellants.

St. Louis Court of Appeals, May 31, 1889.

1. **Judgment.** A decree written out and spread upon the record after the adjournment of the court, and taxing costs against two of the defendants, when the entry on the docket of the judge authorized a general judgment against all the defendants, cannot be questioned on that ground in a collateral proceeding.

2. **Action: TAX PAYER'S RIGHT OF.** Injunction lies on suit of a tax payer to restrain an illegal diversion of public funds which municipal officers in charge of the funds are about to make; nor does the solvency of the officers effect this right.

Appeal from the Knox County Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED.

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O. D. Jones and *L. F. Cottey*, for the appellants.

(1) The petition does not state facts to entitle the plaintiffs to any relief. Injunction is always an auxiliary, restraining and preservative proceeding. The decree written by plaintiffs' attorney in vacation is not binding as to the clause concerning costs. The usual presumption cannot be indulged for the facts are in evidence. We think that clause must be established by *nunc pro tunc* entry, before it can be offered to prove or show any thing. If we are right, then plaintiffs fail on the proof on that part of the case. If not, then it is here and now a question, on the evidence, was that clause in the decree then rendered? The only evidence of it is: (1) The judge's docket entry. (2) The temporary order referred to in it. For in such case only the written memorandum and record can be referred to. *Robertson v. Neal*, 60 Mo. 579; *Belkin v. Rhodes*, 76 Mo. 643; *State v. Jeffors*, 64 Mo. 376. In all cases where a party sues or is sued in a representative or official capacity, costs cannot be taxed against him individually. *Ross v. Alleman*, 60 Mo. 269; *State v. Maulsby*, 53 Mo. 500; *Cassady v. School Trustees*, 94 Ill. 589; *Clare Co. v. Auditor*, 41 Mich. 182; *Hammon v. People*, 32 Ill. 446. "Courts of equity having almost exclusive jurisdiction over suits between trustees and *cestui que* trusts, costs are governed by the special rules obtaining in equity. Trustees prosecuting or defending, without improper motives, in doubtful cases are generally entitled to costs out of the trust fund." Same authority, page 317; *McCutteher v. Windom*, 59 Mo. 149, 153. Both these suits are distinctly against the defendants in their official capacity. No ground is laid in either petition to charge or call them in question "individually." Under our practice recovery of costs is purely a matter of statute. *Steel v. Wear*, 54 Mo. 531. And such statutes must be strictly construed. *Shed v. Railroad*, 67 Mo. 687.

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Blair & Marchand, for the respondents.

The question, as to whether the costs were properly adjudged in former suit against defendants Cornell and Ross, cannot be inquired into in this suit. That judgment, not being appealed from in any manner, must be held final, and respondents estopped from attacking it for errors, irregularities or other cause. *State v. Donegan*, 83 Mo. 374; s. c., 12 Mo. App. 190; *Yates v. Johnson*, 87 Mo. 213; *Merrick v. Merrick*, 5 Mo. App. 123; *Yeoman v. Younger*, 83 Mo. 424; *Duff v. Joyal*, 5 Mo. App. 579; *Knoll v. Woelker*, 13 Mo. App. 275; *National Bank v. Hughes*, 10 Mo. App. 7; *Fulkerson v. Davenport*, 70 Mo. 541; *Dunham v. Wilfong*, 69 Mo. 355. The question of solvency or insolvency of appellants cuts no figure in this case. There is no provision in the law for suing them for illegal acts, or misuse of funds. Who could bring the suit? It is not necessary that injury should be irreparable; nor that defendants should be insolvent. R. S. 1879, sec. 2722; *Bank v. Kercheval*, 65 Mo. 682; *Railroad v. Springfield*, 85 Mo. 674; *Towne v. Bowers*, 81 Mo. 491; *Harris v. Township Board*, 22 Mo. App. 462.

Biggs, J., delivered the opinion of the court.

This controversy is quite similar to and has, in fact, grown out of the case of *Black et al. v. Cornell et al.*, 30 Mo. App. 641. That case was decided on a demurrer in the circuit court in favor of the defendants, and on appeal this court decided that the demurrer was improperly sustained, and reversed the judgment and remanded the cause for further proceedings.

On a rehearing in the circuit court, the defendants refused to plead or in any way answer to the complaint, and at the June term, 1888, the cause was submitted to the court, and the court by its decree, entered of record, among other things restrained and enjoined Uriah A. Ross and Benjamin F. Cornell, the directors of district

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number 2, school township number 15, in Knox county, Missouri, from issuing warrants on the school fund belonging to said district, to pay one F. G. Gibbons and Miss Kate Holliday for teaching a graded school in the town of Hurdland in said district; and the court also enjoined and restrained John F. Beal, county treasurer of the county, from paying any such warrant or warrants. The decree also adjudged the costs of the suit against Ross and Cornell individually.

It seems that the petition for a temporary injunction in that suit was presented to two justices of the county court, and, by mistake or oversight, they neglected to make a restraining order. At the December term, 1887, the circuit court sustained a demurrer to the petition as hereinbefore stated, and, the plaintiffs refusing to amend, the court dismissed plaintiffs' bill.

On the third day of February, 1888, and while said suit was pending in this court, the defendants in the suit at bar, as directors of said school district, issued a warrant on the school fund belonging to the district in favor of F. G. Gibbons for $30.50, teacher's wages.

The plaintiffs in the present proceeding are resident tax payers of the school district referred to, and they instituted this suit in equity against the defendants as directors of said school district and against John F. Beal, county treasurer, in which they sought, among other things, to restrain and enjoin the defendant Beal from paying or receiving the school warrant for $30.50, issued by his co-defendants, in favor of F. G. Gibbons. The plaintiffs aver that this warrant was issued by the directors in payment of Gibbons' salary as teacher of the graded school in the town of Hurdland, which this court held and decided in *Black v. Cornell*, *supra*, could not be legally done by said directors. The plaintiffs also claimed in their petition that the defendants Ross and Cornell were threatening to issue a warrant on the school fund belonging to the district, to pay the costs of the original suit which had been adjudged

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against them individually, and would do so unless restrained and enjoined; and they also averred that the defendant directors were about to misappropriate the funds of the district in the payment of attorneys' fees in the first suit, and they asked that the defendant directors be restrained from issuing school warrants for any such purpose or purposes, and that the defendant Beal be enjoined from paying any such warrant or warrants.

On the sixth day of July, 1888, a temporary injunction was granted, and at the December term, 1888, on a final trial and hearing the temporary injunction was made perpetual; the defendant directors were perpetually enjoined and restrained from issuing warrants or in any way appropriating the money belonging to the school district to pay the costs and attorneys' fees of the original suit; or to pay F. G. Gibbons and Miss Kate Holliday for teaching the graded school, taught in 1888 in the town of Hurdland; and the defendant Beal was prohibited from paying warrants for any such purposes, and he was especially enjoined from paying the outstanding warrant for $30.50, previously issued to Gibbons.

The plaintiffs read in evidence the decree in the original suit in which the costs were adjudged against the defendants Ross and Cornell. Their evidence also tended to prove that the defendants Ross and Cornell had paid a portion of the costs incurred in that suit and threatened to pay the remainder, as well as the attorneys' fees due on account of it, out of the school funds belonging to the school district. Their evidence also established the fact that, while the appeal in the case of *Black v. Cornell* was pending in this court, the defendant directors issued a warrant on the school fund for twenty dollars to pay the expenses of the suit in the appellate court, and further issued and delivered to F. G. Gibbons a warrant on the school fund for $30.50, on account of his salary as teacher of the graded school in Hurdland, which was unpaid in the hands of one

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Brown at the time the temporary injunction in this case was granted. This latter warrant was issued on the third day of February, 1888.

The defendants introduced evidence to the effect that the decree read in evidence was entered of record by the clerk in vacation; that it was prepared, after the adjournment of the court, by one of the attorneys of the plaintiffs, and had not received the sanction of the presiding judge. The entry on the judge's docket was read, which showed that the decree was for the plaintiffs, and that the injunction was made perpetual. It contained no special direction as to the costs. The defendants, Ross and Cornell, testified that they had acted in good faith and under the advice of their counsel, and had only done what they considered to be for the best interest of the district. Ross denied that he had threatened to pay the costs and attorneys' fees out of the public school fund.

The defendants filed a motion to set aside the decree and grant them a rehearing, which was by the court overruled, and they have brought the case to this court for review.

The counsel for the defendants urge that the decree in the original suit afforded the plaintiffs, and other tax payers of the district, a perfect and adequate remedy as to the warrant for $30.50, in that the defendants, Ross and Cornell, were subject to attachment and punishment for disobeying it. This position is untenable for the reason that there was no restraining order by which Cornell and Ross were enjoined or forbidden to issue warrants to Gibbons, until June, 1888. The warrant that was outstanding, and the payment of which was enjoined in this proceeding, was issued on the third day of February, 1888; therefore Ross and Cornell, in issuing this warrant, violated no order of the circuit court, or any other court, and by so doing did not render themselves liable to be proceeded against for contempt.

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The defendants also contend that the decree, restraining the defendant directors from paying the costs of the first suit out of the school fund, ought not to be sustained, because the evidence shows that the decree was written by one of the attorneys of the plaintiffs, and by the clerk spread on the record, after the adjournment of the court; that the decree as written, in so far as it taxed the costs of the suit against the defendants Ross and Cornell, was void and unauthorized by the entry on the judge's docket; that the entry made by the court only authorized a decree in favor of the plaintiffs, and against all of the defendants; that, in the absence of any special order or ruling of the court, the costs would have to go generally against all of the defendants; that the school district was a party to the suit, and that the defendants Ross and Cornell had been acting for the district, and had no greater personal interest in the litigation than any other tax payer or patron of the public school; that the costs ought to have been, and were intended by the court to be, taxed against the district, and that, if defendants Ross and Cornell *did* pay the costs out of the public funds belonging to the district, or intended so to do, they would only do what in equity ought to be done, and what the court intended should be done.

This might afford good and sufficient ground to sustain a motion to correct the judgment in the original suit by a *nunc pro tunc* entry, but the terms of that decree cannot be questioned or attacked in this, a collater proceeding.

The defendants' counsel say that the evidence was not sufficient to authorize the trial court to find that defendants Ross and Cornell were about to pay the amount due the attorneys out of the public school fund. The plaintiffs' evidence on this subject is somewhat blind and unsatisfactory, but we are not prepared to say that, when all facts and circumstances are considered, the decision of the court was wrong.

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But the defendants finally urge that the decree cannot be sustained, even if it be admitted that the outstanding warrant of $30.50 had been illegally issued, and that the defendants Ross and Cornell *were* threatening to pay the costs and attorneys' fees arising out of the other suit, because the plaintiffs have failed to allege and prove that the defendants Ross and Cornell were insolvent, and that a suit for damages against them would be unavailing.

This principle of law has no application to a case like the one under consideration. The defendants Ross and Cornell are the directors of the district and have control of its affairs, and, if they should unlawfully divert the public funds, who would have the right to institute a suit against them for damages for misfeasance in office? The plaintiffs as individual tax payers would certainly have no such right.

If the defendants as directors of the school district were about to make an unlawful and unauthorized disposition of the public school fund, an injunction was the only adequate remedy afforded the individual tax payer, to prevent the illegal diversion. *Black v. Cornell*, *supra; Newmeyer v. Railroad*, 52 Mo. 82; *Ranney v. Bader*, 67 Mo. 476; *Rubey v. Shain*, 54 Mo. 207.

It may be that Ross and Cornell have acted in good faith and for the best interests of the district; yet they undertook, as decided in *Black v. Cornell*, to supply the necessity for a larger and more suitable school building, in a manner not authorized by the statute; and we cannot permit the costs and attorneys' fees, incurred in a litigation caused by their illegal acts, to be paid out of the public school fund. We are clearly of the opinion, however, that it would be much better for the *children* of the district if all parties would take the necessary steps to build a suitable school house, and quit spending their substance in litigation.

We think the decree of the circuit court ought to be affirmed, and it is so ordered. All the judges concur.

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BRIDGET CLARKE, Administratrix of ANTHONY B. CLARKE, Appellant, v. SARAH KANE, Respondent.

St. Louis Court of Appeals, May 31, 1889.

1. **Practice, Appellate.** An objection to the ruling of a trial court in sustaining exceptions to a referee's report, urged upon the ground that these exceptions were not filed within the time prescribed by the statute, cannot be reviewed on appeal, when neither the date of the filing of said report nor the date of the filing of such exceptions appears from the record by bill of exceptions.

2. ———. The minutes of the clerk, copied into the transcript and showing that such exceptions were not filed in time, are not a part of the record, and will not be noticed on appeal.

3. **Practice, Trial.** Such objection comes too late, when not made in the trial court at the time of the filing of the exceptions to the referee's report, but first presented by motion for a new trial after these exceptions are sustained.

4. ———: QUANTUM MERUIT. A recovery cannot be had on an implied contract in opposition to an express contract in force, fixing the rights of the parties.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

Norman Gibbs, for the appellant.

(1) The finding of the referee is to be taken with the same effect as a verdict of a jury. *Smith v. Crews*, 2 Mo. App. 269; *Gimbel v. Pignero*, 62 Mo. 240. This court will not review the evidence in a cause tried before a jury. *Sage v. Reeves*, 17 Mo. App. 210; *Sherer v. Rischert*, 23 Mo. App. 275; *Moore v. Railroad*, 73 Mo. 438; *State v. Brokerage Co.*, 85 Mo. 411; *Donovan v. Barnett*, 27 Mo. App. 460. (2) The exceptions to the report of the referee must be filed within four days, and, if not so filed, judgment should be rendered on the

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report with like effect as upon a special verdict. R. S. 1879, sec. 3622. Defendant's exceptions were not filed till fifteen days in term, after the report was filed, and the exceptions should have been overruled, and the report confirmed and judgment rendered thereon in favor of plaintiff. *Reinecke v. Jod*, 56 Mo. 386. (3) That the services sued for were rendered by plaintiff at the special instance and request of the defendant, Sarah Kane, and, in matters pertaining solely to her separate estate, cannot be questioned. The services being so rendered, her separate estate was bound therefor. Contracts of Married Women (by Kelley) 247, 244, 240–1; *DeBaum v. Van Wagner*, 56 Mo. 348–9; *Myers v. Van Wagner*, 56 Mo. 115, 116; *Siemers v. Kleedburg*, 56 Mo. 201; *Bank v. Robidoux*, 57 Mo. 446, 450–1; *Bank v. Taylor*, 62 Mo. 340. (4) A person may recover on a *quantum meruit* for services rendered on a void contract. *King v. Welcome*, 5 Gray, 41; *Ham v. Goodrich*, 37 N. H. 185; *King v. Brown*, 2 Hill, 485; *Montague v. Garnett*, 3 Bush. 297; *Graham v. Graham's Ex'r*, 34 Pa. St. 475; *Day v. Railroad*, 51 N. Y. 583.

Harding & Buller, for the respondent.

Plaintiff's first point that the judgment should be reversed because the defendant's exceptions to the referee's report were filed too late is not well taken. In an equity suit or in any case that might be referred under section 3606, Revised Statutes, the trial court should review the evidence, and, if it does not sustain the referee's findings, should set the same aside and render judgment according to the evidence whether there are any exceptions or not. *Shore v. Coons*, 24 Mo. 556; *O'Neil v. Capelle*, 62 Mo. 202; *Smith v. Paris*, 70 Mo. 615; *Ely v. Ownly*, 59 Mo. 437; *Caruth v. Welter*, 91 Mo. 484. The rule that report of a referee stands on same footing as a verdict of a jury applies only to actions at law. *Dunlap v. Elk Club*, 25 Mo. App.

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180. Even in a case at law and a jury trial, the trial court may, in its discretion, allow a new trial where the motion was filed too late. *Williams v. Court*, 5 Mo. 248. The facts in this case do not show any such contract or liability. To hold the separate estate of the wife liable must be by her contract at the time the separate estate exists. *Gabriel v. Mullen*, 30 Mo. App. 464; *Bank v. Robidoux*, 56 Mo. 446. The contract plaintiff claims in this case was made in Pennsylvania before the farm was bought, and there is not the slightest evidence that Mrs. Kane had any separate estate prior to the time this farm was bought and deeded to Clarke in trust for her. The judgment in this case should be affirmed, because the appellant has failed to preserve the stipulation of reference. Every presumption is in favor of the action of the trial court. *Stone v. Pennock*, 31 Mo. App. 544. Appellant's abstract of the evidence is too meager to give this court any idea of the merits of the case or errors complained of. *Foster v. Nowlan*, 4 Mo. 23; *Guinn v. Boas*, 31 Mo. App. 131; *In re Assignment Redding Bros.*, 31 Mo. App. 415; *Hyatt v. Woolf*, 22 Mo. App. 191; *Housman v. Hope*, 20 Mo. App. 193; *Coy v. Robinson*, 20 Mo. App. 452; *Goodson v. Railroad*, 23 Mo. App. 76.

THOMPSON, J., delivered the opinion of the court.

This is a suit in equity to subject the separate estate of a married woman to the payment of an indebtedness alleged to be due to the plaintiff from the married woman, for services rendered at her special instance and request and for the benefit of said estate. The petition alleges "that plaintiff, at the special instance and request of said defendant Sarah Kane, and for the benefit of her separate estate, rendered her his labor and service for five months in the year 1876, and also continuously from April 1, 1877 to July 15, 1881, amounting to fifty-six and one-half months, and that said services were of the value of twenty dollars per

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month, amounting to eleven hundred and thirty dollars." The petition also alleges that "between January 9, 1878, and July 15, 1881, he (plaintiff) made improvements on the lands, that constituted a part of said Sarah Kane's separate estate, of the value and to the cost of one hundred dollars, and during the period last aforesaid he (plaintiff) boarded hands, that were engaged in labor upon her said separate estate, to the amount and value of one hundred dollars; that all of said labor and services and improvements and board, amounting to thirteen hundred and thirty dollars, were by plaintiff rendered, done and performed, for the use and benefit of said Sarah Kane's separate estate, and at her instance and request, and that she thereby bound her separate estate for the payment thereof; and that no part of said sum has been paid. That the whole of said sum of thirteen hundred and thirty dollars is still due and owing to plaintiff, and is a charge upon the separate estate of said Sarah Kane. Wherefore," etc.

The answer of J. P. Kane admitted that he was the husband of Sarah Kane, and denied each and every other allegation of the petition. The answer of Sarah Kane admitted that she was the wife of J. P. Kane, denied each and ever other allegation of the petition, and set up as a counter-claim that the plaintiff was indebted to her in the sum of $1,794.77, for the use and occupation of the farm in Lawrence county, Missouri, for three years at two hundred dollars per year; for money had and received by the plaintiff for the use of the defendant; for money lent by the defendant to the plaintiff; for goods and property sold by the plaintiff belonging to the defendant and appropriated to his own use; and for boarding himself (*sic*) by defendant following with an itemized statement of the counter-claim. There was a reply putting in issue the new matter and pleading the statute of limitations as to such of the items as had not accrued within five years.

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By a stipulation of the parties the cause was referred to a referee; but the stipulation is not on file, and the record entry does not state the scope of the reference. But from the fact that the referee filed a report disposing of all questions in controversy both of law and fact, and from the fact that the exceptions to the report did not challenge it as being in any respect outside of the scope of the order of reference,—we may conclude that it was a full reference to try and dispose of all questions both of law and fact. The report of the referee made a finding, and recommended a judgment in favor of the plaintiff, in pursuance of the prayer of the petition, for the sum of $789.24, the same to be a charge upon the separate estate of the defendant Sarah Kane. The defendants filed exceptions to this report, and, on the same day, the plaintiff filed a motion to confirm the report and for judgment in pursuance thereof. These motions were taken up and argued on their merits, and the court set aside the report, and, on consideration of the evidence reported by the referee with the report, rendered judgment for the defendants, dismissing the plaintiff's petition. From this judgment the plaintiff prosecutes the present appeal.

Pending the proceedings the plaintiff has died, and the cause has been revived in the name of his administratrix, Bridget Clarke. The defendant J. P. Kane has also died, leaving the defendant Sarah Kane, against whom alone substantial relief is sought, as the sole defendant. For convenience, the parties are designated in this opinion as they stood at the commencement of the action,—the word plaintiff referring to the original plaintiff Anthony B. Clarke, and the word defendants referring to the defendant Sarah Kane and J. P. Kane.

I. Before proceeding to an examination of the merits, it is necessary to dispose of a technical objection raised by the plaintiff, which is that the defendant's exceptions to the report of the referee were not filed

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within four days after the filing of the report, as required by section 3622, Revised Statutes, and were not filed until fifteen days after the filing of the report. This objection may be disposed of by two observations. The first is that the bill of exceptions neither shows the date of the filing of the report nor the date of the filing of the exceptions to it. It is true that minute entries of the clerk, copied into the transcript but not incorporated in the bill of exceptions, show that the exceptions to the report were filed fifteen days after the filing of the report. But it is a well-settled rule of procedure in this state that the clerk cannot make a record. For instance, the minute entry of the clerk, showing the date at which a motion for a new trial was filed, is not evidence of the fact, but it must appear by the bill of exceptions that the motion was filed within the time prescribed by the statute, or it will not be deemed to have been filed in time. Thus technicality meets technicality and disposes of this objection. But there is another ground equally fatal to it. No objection was made, at the time when the exceptions to the report were filed, to the filing of such exceptions on the ground that more than four days had elapsed since the filing of the report, and no exception was saved to the filing of them on that ground. On the contrary, the report was taken up and considered on the exceptions of the defendants and on the motion to confirm it made by the plaintiff, and, on the merits of the case, the court, after hearing argument, rendered the decree above stated; and the objection, now put forward, that the exceptions were filed out of time, did not make its appearance until the motion for new trial, after the plaintiff had failed on the merits. It was then too late. Parties cannot make their objections, and take their exceptions for the first time, in a motion for new trial.

II. This brings us to the merits of this controversy, as exhibited by the evidence filed by the referee with

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his report. This evidence consists of some five hundred pages of testimony and exhibits. But it has been carefully considered, and will now be disposed of as briefly as possible.

The parties are all natives of Ireland. The plaintiff is the brother of the defendant, Sarah Kane, and the defendants, Sarah Kane and J. P. Kane, are husband and wife. They were married in Ireland in 1859, and soon after removed to this country. After some changes they finally settled in Scranton, Pennsylvania, where Mr. Kane, first alone, and afterwards with his daughter, pursued the occupation of school teacher, and Mrs. Kane kept boarders. By industry and frugality they gradually accumulated about eighteen hundred dollars in money, besides a house and lot, vested in Mrs. Kane, which for several years yielded a rental of ten dollars a month, and afterwards of five dollars a month. They had a large family of children to support.

The plaintiff remained in Ireland and married there. He came to this country in 1875, and from that time on he and his family became, more or less, a charge upon the benevolence of his sister and brother-in-law, these defendants. They boarded him for several months when he was out of employment, for which they received no remuneration. At his earnest solicitation, they sent a draft of five pounds to his family in Ireland, which then cost thirty-three dollars in our inflated currency. Finally, in the year 1876, the plaintiff, having a longing desire to see the great West, started toward the setting sun, in the character of an itinerant peddler, with a traveling companion named Thomas Clarke. They peddled as far as Chillicothe, in Missouri, where the plaintiff found himself stranded, and was obliged to appeal to the defendants for assistance, to which appeal they responded to the extent of a remittance of ten dollars. With this aid he went forward to Colorado, where he found himself again obliged to appeal to them for aid, and they again responded to the extent of

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twenty dollars. Here he parted with his co-adventurer and bent his steps toward the East, at the solicitation of the defendant, J. P. Kane, who was in trouble and in litigation at Scranton, to which place he returned. On his way back he passed through Pierce City, in this state, where he had seen a farm which was for sale, known as the Legrand farm. Of this farm he brought a glowing account to his brother-in-law and sister, and according to their testimony expressed the belief that, if he were on the farm, he could make five hundred dollars a year off it. They finally concluded to send him back to Pierce City to purchase the Legrand farm, or some other farm in that vicinity, under the arrangement that he should move upon it and occupy it with his family as soon as they could be brought over from Ireland.

To facilitate this enterprise, they placed in his hands three hundred dollars, and sent him to Pierce City. They also advanced to him seventy-three dollars to bring his family to this country, and this money was expended in bringing them over. He went to Pierce City, and, after examining many farms and spending considerable time in negotiations and inquiries, during which time he was in active correspondence with his brother-in-law at Scranton, he, or rather they, for the final decision was made by them, decided upon the purchase of the Legrand farm for fifteen hundred dollars in cash, and one thousand dollars payable in five equal installments, in one, two, three, four and five years, the deferred payments drawing interest at seven per cent. per annum. They forwarded fifteen hundred dollars in currency to him by express, and with this he paid the cash portion of the purchase price, and took a deed for the land, by which the title was vested to him in fee, but in trust for the sole and separate use of the defendant Sarah Kane. With what remained of the three hundred dollars, with which they had furnished him when he left Scranton, he purchased a team and utensils

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and prepared himself, as best he could, to work the farm. It was a partly improved farm, having a log house and buildings upon it. When possession was delivered to him there was a harvested crop upon it, but it did not turn out according to his expectations. During the succeeding three years, 1878, 1879 and 1880, he made almost nothing on the farm, a circumstance attributable, no doubt, in part to his insufficient equipment at the commencement, in part to his want of experience as a farmer, and in part to unfavorable weather. They were obliged to advance more money to him to assist him in getting along, and also to pay the interest and meet one of the deferred payments of the purchase money. The correspondence between him and J. P. Kane, most of which is in evidence, shows that the latter continuing his occupation of school teacher in Pennsylvania and supporting his large family, was struggling very hard to save up and forward to the plaintiff every dollar he could, having the fullest confidence in him and being in a continual state of fear that the farm would be lost by reason of not making the deferred payments. In 1880, Mrs. Kane went out to Pierce City, and was coldly received by her brother and his wife. According to her testimony, she succeeded in exacting from him a promise that he would pay them one hundred and seventy-five dollars a year for the rent of the farm while he stayed on it, which would be seven per cent. per annum on twenty-five hundred dollars, the total investment in the farm; which agreement, if ever made, he finally repudiated. In 1881, the defendant, with his wife and family, removed from Pennsylvania to Pierce City, without advising the plaintiff that they were coming, and went immediately into the house, and occupied it jointly with the plaintiff and his family. A quarrel ensued, and, as we infer from the testimony, the defendants were obliged to resort to an action of ejectment to recover the farm, and were obliged to bring an action or

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actions of replevin to recover the personal property on the farm, which had been either purchased with money which they had forwarded to the plaintiff, or which consisted of the increase of property so purchased. The plaintiff, while thus occupying the farm, expended some labor in improving a portion of the land, by removing sprouts and stones from it. In his petition as above seen, he makes a claim of one hundred dollars for improving the land; but there is no evidence in the record as to the value of such improvements. Assuming, however, that it was of the value charged for in the petition, it would still be much less than the moneys which the defendant had advanced to him and which had been expended for his personal use.

This preliminary statement brings us to the conflicting evidence as to the terms of the contract under which the plaintiff purchased the farm, took possession of it, lived upon it, and cultivated it. The plaintiff's version of the contract is thus stated in his own language, testifying as a witness: "I was to have half of the farm and half of everything belonging to it. There was no written contract whatever between us, and no agreement to keep any account or record of anything, or keep the letters, or account for moneys. I was to have the money and do what I pleased with it." The defendants' version of the contract is thus given in the testimony of Mrs. Kane: "My husband told him he would assist him all he could; that, if he came and bought the Legrand farm for us, he could have the use of it for such time as we did not need it, by paying two hundred dollars a year for the use of the farm, or the money so invested, while he used it for his benefit." The defendants' version of the contract is also given in the testimony of Mr. Kane: "I will here state there was no proposition or contract, either verbal or in writing, in the year 1876, that Clarke was to have any portion or part of any farm that might be purchased for Mrs. Sarah Kane. There was no talk about such a

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thing in the year 1876. * * * I suggested to him the propriety of going out and purchasing the Legrand farm for Mrs. Kane. Mrs. Kane said to Clarke for him to go and purchase the Legrand farm, as he might live on it until such time as we would need it, by paying about two hundred dollars a year for its use, which he then considered reasonable; he having previously stated that he could make five hundred dollars a year on it if he had it."

The first finding of fact made by the referee was "that about the first of April, 1877, the plaintiff, Anthony B. Clarke, commenced to labor for the defendant, Sarah Kane, at her instance and request, *without any agreement as to compensation.*" This is the basis of the succeeding findings of the referee. This finding is not only not supported by any evidence in the case, but, as above seen, it is contradicted by the evidence of both parties. The plaintiff's evidence, briefly, is that he was to buy the land with the money advanced by the defendants, was to move on it, cultivate it and live upon it and have half of it. The defendants' evidence is that he was to buy the land and move on it, yielding them a rental of two hundred dollars a year, or thereabouts, while they allowed him to live on it. The theory on which this action is brought seems to be that, as the contract which was really made was broken by the defendants, the plaintiff can abandon that contract and recover upon an implied *assumpsit* the reasonable value of his services. Such is not the law. There can be no recovery on an implied contract in opposition to an express contract in force fixing the rights of the parties. *Christy v. Price*, 7 Mo. 430, 433; *Suits v. Taylor*, 20 Mo. App. 166, 173; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Davidson v. Bierman*, 27 Mo. App. 655.

In *Ashbrook v. Dale*, 27 Mo. App. 649, 654, the principle was conceded, *arguendo*, "that, where an express contract fails for informality, a party may still

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recover on a contract, implied by the law, that the other party will pay a reasonable compensation for the benefit received." But this principle cannot avail to give the plaintiff a right of action, on an implied *assumpsit*, for his work and labor on the farm of Mrs. Kane in this case. First, it is not at all clear that this contract, assuming that the plaintiff's version of it is true, has failed for informality. It does not appear, reasoning from its terms, that there is any insuperable obstacle in the way of his enforcing a specific performance of the contract, provided he can get a judge, sitting as a chancellor, to believe his version of it. Parol evidence will avail to establish a resulting trust in land, provided the evidence is clear and satisfactory. If in this case the plaintiff could not enforce this contract according to what he claims to be its terms, it must be ascribed to his own folly in not having it reduced to writing. In the second place, there is no evidence of any benefit accruing to Mrs. Kane from the work and labor done by the plaintiff on the farm for which he prosecutes this action—none whatever. He claims to recover for services as a farm laborer, at the rate of twenty dollars a month, during all the time that he resided upon, took care of and cultivated the farm. But the defendants never got a dollar out of it during all this time, except some personal property which they obtained in 1881, when they took possession, and also what was saved of the crop of that year, which was of little value,—all of which was less in value than the three hundred dollars, which they had furnished the plaintiff at the outset, and the money which they had advanced to him for his own personal use. During all this time he had the use of the farm *gratis* for the support of himself and family. As already observed, there is no evidence as to the extent to which he improved or bettered the land; but giving him what he claims for such improvements in his petition, and it, together with

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the personal property and the crop of 1881, would not equal the money advanced to him by them for his personal use while he was in the occupancy of the land.

This consideration renders it unnecessary for us to express an opinion upon the weight of the evidence adduced by the contending parties in support of their respective versions of the contract. The plaintiff's statement is supported by the testimony of four witnesses as to statements made to them by the defendants after they had arrived at Pierce City, which statements they deny. The letters of the defendant J. P. Kane, who, as agent for his wife, had charge of the transaction, more than fifty in number, written from his home in Pennsylvania to the plaintiff at Pierce City, add some color to the plaintiff's version of the transaction; but there is not a line in these letters, nor is there a scrap of writing, which exhibits the contract according to the version of either party; and after the year 1880, when the period of controversy commenced between the parties, we find nothing in their correspondence hinting at the plaintiff's version of the contract. On the contrary, in his letter of February 21, 1881, he gives a statement of the receipts from crops and expenditures of the preceding year, showing a balance in his hands of $104.10, which he offers to turn over to the defendants, together with a considerable list of personal property. When the defendants arrived at Pierce City, Mr. Kane demanded this money of the plaintiff, and he refused to turn it over, on the ground that his wife had it, and would not give it up. This led to a disturbance, and from this time on the parties were enemies, and a succession of law suits followed. It should seem that, if the plaintiff's version of the contract were true, it would crop out in some of the correspondence which took place after the *stress* between the parties began. It is true that many of the earlier letters of Mr. Kane to the plaintiff read as though there had been an understanding that

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the plaintiff was to have some interest in the farm beyond that of a mere renter.

On the other hand, we have the positive testimony of both the defendants that no such agreement was ever made or talked of, and the defendant J. P. Kane testifies that he never heard of it until this action was brought. This testimony is supported by the inherent improbability of any such arrangement ever being made. These two defendants had saved this small sum of money by a long course of laborious frugality. If we may credit the letters of Mr. Kane to the plaintiff, which we understand to have been put in evidence by the plaintiff and to be now relied on by him, we must conclude that during most of the period while plaintiff was in the occupancy of the farm, Mr. Kane was working and pinching and saving to the utmost to get a little money to forward to him to meet his wants, to assist him in working the farm, and to prevent the farm being taken from them for the unpaid purchase money. It appears that the defendants had invested their all in this venture; it seems highly improbable that they would invest their all in a venture on the basis of giving half of it to their dependent relative at the very outset. If he was to have half of the land and personalty, it would have been perfectly simple to have had the deed made in such a form as to express that intent, or to have had it expressed in some other writing. In dealing with a matter so important that would be the most obvious suggestion of prudence.

To establish the existence of an arrangement so improbable the evidence ought to be as clear and cogent as that required by courts of equity to establish a resulting trust—especially where it is sought to charge an indebtedness upon the estate of a married woman. On the whole, the equity seems to be in favor of the defendants rather than in favor of the plaintiff. He has had the use of their farm for the support of himself and family, rent free for three or four years. He has had considerable money for his personal use which they have

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advanced to him. He has never returned anything to them, except what they got by legal process in 1881; and, if he has bettered the land, the betterment is slight and inconsiderable, and there is no evidence as to its value.

The judgment will be affirmed. All the judges concur.

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I. B. ROSENTHAL *et al.*, composing firm of I. B. ROSENTHAL & Co., AND A. KRAMER *et al.*, composing firm of KRAMER & LOTH, Appellants, v. L. E. GREEN, Garnishee, ISIDORE SCHNITZER, Defendant, NATHAN FRANK AND DAVID P. DYER, Interpleaders and Respondents.

St. Louis Court of Appeals, May 31, 1889.

1. **Voluntary Assignments.** A transfer by an insolvent of a judgment in his favor, if made in trust to secure first the transferee, who is a creditor, and next, *pro rata*, other debts owing by the insolvent, is, after the satisfaction of the claim of the transferee, a voluntary assignment within the meaning of the statute regulating voluntary assignments.

2. ——. The fact that such assignment is neither recorded nor acknowledged does not render it invalid.

Appeal from the St. Louis City Circuit Court.—HON. SHEPARD BARCLAY, Judge.

AFFIRMED.

David Goldsmith, for the appellants.

The transfer or assignment of judgment made to Dyer and Frank was a voluntary assignment within the meaning of the statute. *Manny v. Logan*, 27 Mo. 528; *Mills v. Williams*, 31 Mo. App. 447; *Britton v. Lorenz*, 45 N. Y. 51; *Bonns v. Carter*, 20 Neb. 566; *Wallace v. Wainwright*, 87 Pa. St. 263; *Dickson v. Rawson*, 5 Ohio St. 218; *Nat. Bank v. Trust Co.*, 11 Phila. 510.

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Being so, it was void as against the plaintiffs and Kramer & Loth, who were attaching creditors, because it was neither recorded nor acknowledged as required by the statute. *Hardman v. Bowens*, 39 N. Y. 196; *Britton v. Lorenz*, 45 N. Y. 51; *Adler v. Lange*, 21 Mo. App. 519; *Rindleman v. Willard*, 15 Mo. App. 381, 382; *Eppright v. Nickerson*, 78 Mo. 485 to 487; *Decombes v. Wood*, 91 Mo. 196; *Zimmerman v. Willard*, 114 Ill. 364; Burrill on Assignments [5 Ed.] p. 377, note 2; Maxwell on Statutes, p. 450; Endlich on Interp. of Stat., sec. 431. If the transfer to Messrs. Dyer and Frank be not an assignment within the purview of the statute, it is invalid under the evidence for two reasons, viz.: (1) Because there was no evidence of the existence of any indebtedness to the parties named therein (excepting of course Messrs. Dyer and Frank, whose claim has been paid, and Messrs. Kramer & Loth, who attached the fund). *Crow v. Tevis*, 5 Mo. 484; *Hughes v. Ellison*, 5 Mo. 463; *Brown v. Knox*, 6 Mo., pp. 315, 316. (2) Because there was no acceptance by the beneficiaries prior to the garnishment. *Ridge v. Olmstead*, 73 Mo. 578; *Gage v. Parry*, 69 Ia. 605; *Kelly v. Roberts*, 40 N. Y. 432: *Gibson v. Rees*, 50 Ill. 399, 401; *Scott v. Percher*, 3 Merivale, 651; *Welch v. Sackett*, 12 Wis. 243; *Oxnard v. Blake*, 45 Me. 602; *Bell v. Bank*, 11 Bush. 34.

Nathan Frank, for the respondents.

The process of garnishment cannot issue against the garnishee in this case, L. E. Green. He was a judgment debtor in a judgment against himself, obtained in the circuit court of the United States for the eastern district of Missouri. Waples on Attachment, p. 597. The judgment debtor L. E. Green in this case is one of the attaching creditors in this case being a partner of I. B. Rosenthal & Co., and is consequently suing himself, and this is not permissible. The assignment of the judgment to Dyer and Frank was not an assignment for the

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benefit of creditors under the voluntary assignment act of the state of Missouri. But if it was, it seems to us, that is the end of the case. The parties mentioned in the assignment are presumed to have assented to it; there are no burdens attached to them, and, where there is no stipulation in an assignment for the benefit of creditors which is not for their benefit, their assent will be presumed. *Duval v. Raisin*, 7 Mo. 449. It is not necessary to the creation of a trust in favor of any one that the party named in the trust should either be a party or assent to it. If the trust be for his benefit, the law presumes his assent to it till the contrary is shown. Burrill on Assignments, secs. 264, 351; *Rindleman v. Willard*, 15 Mo. 381, 382; *Douglass v. Cissna*, 17 Mo. App. 44; *Bascomb v. Rainwater*, 30 Mo. App. 433. If the instrument in question is a deed of assignment, then the plaintiffs have no right of attachment, unless there is actual fraud and their proper remedy as laid down in a number of Missouri cases is to come into the assignment and share *pro rata* with all other creditors. *Crow v. Beardsley*, 68 Mo. 435; *Hardcastle v. Fisher*, 24 Mo. 70; *Ring v. Ring*, 12 Mo. App. 88; *Sexton v. Anderson*, 95 Mo. 373, p. 382; *Mills v. Williams*, 31 Mo. App. 447, 458, 460; *Smith & Keating Co. v. Thurman*, 29 Mo. App. 187.

Biggs, J., delivered the opinion of the court.

This is a litigation between the appellants in two attachment cases, and the interpleaders Nathan Frank and D. P. Dyer.

The parties are contesting their respective claims to a fund of twelve hundred and fifty dollars, paid into court by Lewis E. Green, who was summoned as garnishee in attachment proceedings against one Isidore Schnitzer. The plaintiffs in the attachment suits and the interpleaders were ordered by the court to interplead for the fund, and on the issues, thus formed, there was a

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trial before the court without a jury, resulting in a judgment in favor of Dyer and Frank. From that judgment the plaintiffs have appealed.

The two cases were disposed of by one trial in the circuit court, and by consent of the parties but one bill of exceptions was filed which included both cases, and the actions thus consolidated are brought to this court for our determination. We will hereinafter treat the proceedings as one action.

The case was submitted to the court upon an agreed statement of facts. It appears from the statement that Isidore Schnitzer, on the sixth day of October, 1885, recovered a judgment in the United States circuit court for the eastern district of Missouri, against Lewis E. Green for twenty-five hundred dollars. Green was a member of the firm of I. B. Rosenthal & Co. After the rendition of the judgment and on the same day, the following paper was executed by Schnitzer, and by him delivered to his attorneys, Dyer and Frank, to-wit: "Whereas, I, Isidore Schnitzer, of the city of Helena, state of Arkansas, recovered judgment in the circuit court of the United States, eastern district of Missouri, for the sum of twenty-five hundred dollars, damages, against Lewis E. Green, of the city of St. Louis, state of Missouri, as appears by the record of said court. Now, know ye, that I, the said Isidore Schnitzer, for and in consideration of services to me rendered by David P. Dyer and Nathan Frank, attorneys, and in consideration of my indebtedness to J. Meyberg and Rothschild Bros., A. Frankenthal & Bro., Kramer & Loth, Joseph Baum, all of St. Louis; Wald & Son, Cincinnati, Ohio; M. Wolf & Co., of New York; Mrs. L. Ettman, of Friar's Point, Mississippi, have granted and transferred, assigned and set over, and do, by these presents, grant, transfer and assign the said judgment so recovered as aforesaid against said Lewis E. Green to Nathan Frank and D. P. Dyer, aforesaid, in trust to pay them my indebtedness to them for services rendered,

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and then they to pay over balance remaining, *pro rata*, to my said creditors above named. Hereby authorizing said N. Frank and D. P. Dyer to take such proceedings in their or my name as they may see fit to enforce payment of said judgment.

"Witness my hand and seal this sixth day of October, 1885.

"ISIDORE SCHNITZER, (Seal)."

This transfer was noted on the margin of the record of the judgment, and was on the day of its execution filed by Dyer and Frank with the papers in the case. Thereafter Green paid the costs and also paid to Dyer and Frank one-half of the judgment, it being the amount claimed to be due them for services in procuring the judgment. On the seventh day of October, 1885, Green was summoned as garnishee in the attachment proceedings begun by the plaintiffs against Schnitzer. Green answered that he had paid one-half of the judgment to Dyer and Frank, and that he was informed that they claimed the remainder as trustees for certain creditors named in a written assignment held by them. After this, such proceedings were had, that by consent of parties Green paid the balance due on the judgment into court, and the plaintiffs, and Dyer and Frank filed their respective interpleas claiming the fund.

It might be well enough to state in this connection, that the record shows that during the pendency of this proceeding in court room number 3, the Fourth National Bank, another creditor of Schnitzer, instituted a suit in the circuit court, which was assigned to room number 4, against Dyer and Frank, to have the assignment to them of the remaining one-half of the Green judgment declared to be a deed of assignment under the statute for the benefit of all of Schnitzer's creditors. A trial of this proceeding resulted in a finding that the paper delivered to Dyer and Frank by Schnitzer *was* in effect a general assignment, and Dyer and Frank were

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required to qualify as assignees under the statute, which they did.

It was also agreed that Schnitzer was insolvent; that he resided in the state of Arkansas, and that he had no property other than the Green judgment.

Upon these facts it was also stipulated and agreed that the only question to be determined by the circuit court was whether, after the payments made by Green, the assignment to Frank and Dyer of the remainder of the judgment was effective, legal and binding as against the plaintiffs.

The positions assumed by counsel for the plaintiffs are: *First.* That the paper delivered by Schnitzer to Dyer and Frank was, in so far as it attempted to prefer the creditors therein named, other than Dyer and Frank, a deed of assignment under the statute for the benefit of all creditors and should be so construed by the courts. *Second.* That, being a deed of assignment and not acknowledged and recorded, it was not valid or effective as against the plaintiffs who were attaching creditors.

We are inclined to hold with plaintiffs on the first proposition, but cannot consent to the second.

I. The question is, what is the legal character of the written instrument? Is it a bill of sale, or a deed of assignment? The interpleaders contend that it is a bill of sale. We are satisfied that they are correct in so far as the instrument applies to their debt against Schnitzer, because a reasonable construction or interpretation of the instrument would lead to the conclusion, that the transfer was made and accepted as a payment, without any condition or trust, so far as their debt was concerned. But when we consider the assignment as to the disposition to be made of the residue and the language employed, we are led to the conclusion that the application of proper legal tests would render that portion of the written instrument, in effect, a deed of assignment under the statute. If this conclusion is

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correct, it follows that the attempt on the part of Schnitzer to give preference to the creditors therein named is nugatory.

We do not think that the fact, that this judgment constituted all of Schnitzer's property, is any reason why the paper should be construed to be a deed of assignment under the statute. This is the construction placed on our statute by the federal court, but this court and the supreme court have declined to adopt this construction. In this state, a debtor may sell all of his property in payment of one particular debt. The supreme courts of other states, having a similar assignment law, have ruled in the same way. *Low v. Wyman*, 8 N. H. 536; *Mer. Man. Co. v. Smith*, 8 N. H. 347; *Barker v. Hall*, 13 N. H. 298; *Brown v. Foster*, 2 Met. 152; *Henshaw v. Summer*, 23 Pick. 446; *Lampson v. Arnold*, 19 Ia. 479. Our conclusion as to the character of the assignment has been reached by what we conceive to be a proper construction or interpretation of the language employed.

To constitute a bill of sale, there must be either a consideration actually paid or agreed to be paid for the property, or it must appear that the assignment was received at a fixed sum, in payment, or part payment, of a debt, and subject to no conditions or trusts. *Mills v. Williams*, 31 Mo. App. 457; *Keiler v. Tutt*, 31 Mo. 306. A deed of assignment is an absolute transfer of property to an assignee in trust, for the purpose of raising funds by a sale of the property to pay debts, and by which the grantor parted with all dominion over the property. *Smith & Keating Imp. Co. v. Thurman*, 29 Mo. App. 191. It must be held that the instrument cannot, from its phraseology, be deemed an absolute bill of sale, because a trust is expressly created in favor of creditors as to the residue of the judgment. But we find no difficulty when we apply to the writing the necessary requisites of a deed of assignment. After the satisfaction of the debt due Dyer and Frank, there was

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an absolute transfer of the residue of the judgment to them, *in trust*, to collect and pay *pro rata* to the creditors named. There was no interest in the judgment reserved by Schnitzer.

II. The plaintiffs' counsel urge that, because the instrument was not acknowledged and recorded, it is void as to them. We do not think that our statute governing deeds of assignment will admit of the construction placed on it by the plaintiffs' counsel. It is true that the statute provides that every deed of assignment shall be acknowledged and recorded, but it does not provide that such a deed shall be void or inoperative unless it is acknowledged and recorded. Our statute requires all conveyances of real estate to be acknowledged and recorded, yet no one will pretend that a deed that is not acknowledged or recorded is not good between the parties and those having actual notice of its existence. *Caldwell v. Head*, 17 Mo. 561; *Harrington v. Fortner*, 58 Mo. 468; *Draper v. Bryson*, 17 Mo. 71.

The law governing chattel mortgages cannot be applied, as urged by counsel, because the statute expressly provides that, if possession of the property remains with the mortgagor and the mortgage is not recorded, it is absolutely void as to creditors and purchasers, and that it makes no difference that the party contesting its validity knew of its existence. We have similar statutes in reference to conditional sales of chattels, and gifts and loans of goods and chattels, and these statutes expressly provide that, unless the contracts upon which such rights are based are reduced to writing and acknowledged and recorded, they shall have no validity as to third persons. But no such idea or purpose of the legislature can be gathered from our statute governing assignments.

Plaintiffs rely on *Hardmann v. Bowen*, 39 N. Y. 196, and *Britton v. Lorenz*, 45 N. Y. 51. It was decided in these cases, that the title to property could not

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become vested in the assignee under a deed of assignment, until the latter was acknowledged by the assignor as required by statute. The statute of New York is quite different from ours. It expressly provides that there can be no *lawful delivery* of a deed of assignment to the assignee until it is acknowledged and the certificate of acknowledgment endorsed thereon. (Laws, 1860, chapter 348.)

It is admitted that Schnitzer delivered the assignment to Dyer and Frank on the sixth day of October, 1885, and that they accepted the same and agreed to assume the trust imposed; and that the assignment was noted on the margin of the record in the United States court and filed with the papers in the case. Under this state of facts, we have been unable to find any adjudicated case in this state, that affords any authority for the conclusion that plaintiffs' garnishments take precedence over this assignment. *Douglass v. Cissna*, 17 Mo. App. 60; *Rindlemann v. Willard*, 15 Mo. App. 380.

The view we have taken of this case, makes it unnecessary to notice or discuss other questions presented. The right of the firm of Rosenthal & Co. to maintain a garnishment proceeding against Lewis E. Green, a member of the firm, opens a very wide field for judicial inquiry. Our conclusion on the other branch of the case makes a discussion of this subject unnecessary.

It results that the judgment of the circuit court will be affirmed. Judge THOMPSON concurs. Judge ROMBAUER concurs in the result.

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Charles A. Spalding, Respondent, v. James E. Munford, Appellant.

St. Louis Court of Appeals, May 31, 1889.

Lease, Construction of. Under a lease requiring the tenant to repair all damage done to the premises during his occupancy, "the usual wear and tear and providential destruction by fire excepted," and providing that rent should cease "in the event of the destruction of said premises by fire," a destruction which does not permanently unfit the premises for occupation does not release the tenant from the payment of rent.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel Dillon, Judge.

Affirmed.

Robert M. Foster, for the appellant.

(1) The fire clause in this lease should not be held to mean a total destruction of the rented premises. May on Insurance [2 Ed.] sec. 421*a*. "Total loss" means when the building has lost its identity and specific character as a building. The question as to the destruction of the leased premises should have been submitted to the jury. Flanders on Fire Insurance [2 Ed.] 605; *Brinkley v. Ins. Co.*, 9 Met. 195. (2) There was evidence on which to have sustained a verdict for the defendant. It should have been submitted to the jury. *Haliday v. Jones*, 59 Mo. 482; *De Grew v. Pryor*, 53 Mo. 313; *Wilson v. Board of Ed.*, 63 Mo. 137; *Buesching v. Gas Co.*, 73 Mo. 231.

Chas. F. Joy, for the respondent.

All the witnesses admit that the only part of the building in question, which was burned, was the roof,

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and this was two stories above the premises leased to the appellant. The evidence therefore does not establish any defense.

Thompson, J., delivered the opinion of the court.

This is an action for arrears of rent under a lease. The premises consisted of the basement and first and second floors of a four-story building in the city of St. Louis. The lease contained a covenant on the part of the lessee, "to repair all damages done to the premises during his occupancy, or pay for the same, * * * the usual wear and *tear* and providential destruction, or *destruction by fire*, excepted." It also contained this clause: "It is mutually agreed that, in the event of *destruction of said premises by fire*, the rent herein agreed upon shall cease."

The lease was for a term of six years, and expired on the thirty-first of December, 1887. On the tenth of November, 1887, a fire broke out in the building, which burned the roof off, and did much damage on the fourth floor, but did not extend below that floor. The firemen, however, cut holes through the floors of the premises included in the lease, to let the water through, and the windows of those floors were also broken in, and the property of a sub-lessee of the defendant, which consisted of printing materials, was damaged by water. The defendant paid rent down to the tenth of November, and declined to pay for the balance of the term. The defense now set up to this action is that the premises were destroyed by fire within the meaning of the lease.

The court instructed the jury "that if they believe from the evidence that the defendant rented the premises in question from the plaintiff for a period which did not end until December 31, 1887, and at the rate of $104.16⅔ per month, and if they further believe from the evidence that there remains due and unpaid from said defendant rent from the tenth day of November until

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the thirty-first day of December, 1887, for said premises, then they will find for the plaintiff in the sum of one hundred and seventy-three and sixty-hundredths, with interest thereon at six per cent. from March 17, 1888, to date."

The jury thereupon returned a verdict for the plaintiff without leaving their box. This instruction, it is observed, ignored the defense of destruction of the premises by fire; and this is the error complained of.

There was no error in this instruction. It was for the court to interpret the clause of the lease upon which this defense was predicated, and to determine whether there was any substantial evidence tending to show a state of facts within it. There was no such evidence. The meaning of the clause in the lease was a total destruction of the premises, such as would require a *rebuilding*, as distinguished from a repairing. The meaning is substantially that there must be such a destruction as permanently unfits the premises for occupation.

There was no evidence tending to show such a loss. The most that can be ascribed to the evidence, taking it as a whole, is, that holes were cut through the floors, that the windows were broken, and that the stock was wet. The sub-tenant of the defendant did not even move out. Nor is it material that the court declined to enter into an inquiry why he did not; because a lessee is bound to pay rent during the term, notwithstanding the premises may become entirely useless and uninhabitable to him, unless he is exonerated therefrom by the provisions of the lease. *Burnes v. Fuchs*, 28 Mo. App. 281. The mere fact that the premises may have become temporarily unfit for occupancy did not tend to show a destruction by fire within the meaning of the policy.

Judgment affirmed. All the judges concur.

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ST. LOUIS AGRICULTURAL AND MECHANICAL ASSOCIATION, Respondent, v. RUFUS J. DELANO *et al.*, Appellants.

St. Louis Court of Appeals, May 31, 1889.

1. **Practice, Appellate.** The validity of a contract cannot be questioned on appeal, if not first questioned in the trial court.
2. **Practice, Trial:** PLEADING. When a petition states a contract valid on its face, and extrinsic matter not appearing from the petition is relied upon as invalidating the contract, such matter must be pleaded in order to bring the validity of the contract into question.
3. **Statutes, Construction of.** Indulgence in athletic games and sports on Sunday is not prohibited by Revised Statutes, section 1578, which prohibits labor on Sunday, except works of necessity and charity.
4. **Practice, Trial.** Evidence, competent against one of several defendants but not against the others, must be admitted, but those against whom it is not competent may have its effect limited by instruction.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED, (*and certified to the supreme court.*)

Rufus J. Delano, *Chas. F. Joy* and *Jas. P. Kerr*, for the appellants.

The contract, even if it were entered into by defendants, is illegal and void, and could not be enforced, being a Sunday contract. Wag. Stat., secs. 1578, 1580, 1508; *Bernard v. Lupping*, 32 Mo. 341; *Guinn v. Railroad*, 20 Mo. App. 453; *Sheffield v. Balmer*, 52 Mo. 474; *De Forth v. Railroad*, 52 Wis. 329; *Robeson v. French*, 12 Met. 25; *Johnson v. Brown*, 13 Kan. 529. The evidence does not establish a contract

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on the part of the defendants; no authority to bind them was shown. *Volger v. Ray*, 131 Mass. 439; *Page v. Snow*, 12 Cush. 443; *Barry v. Nuckolls*, 2 Humph. 324; *Richmond v. Judy*, 6 Mo. App. 467; *Sizer v. Daniels*, 66 Barb. 426; *Fleming v. Hector*, 2 M. & W. 171. The court erred in admitting in evidence for respondent the letter of Mr. Delano, written as an attorney, long after the meeting; that said letter was written in connection with a compromise and adjustment of a claim which was not admitted therein to be correct; it could not be a ratification at that time, and, further, that said letter influenced the court.

Chas. S. Taussig, for the respondent.

All members of the defendant association who were parties to the contract, assented thereto or ratified the same, are liable in this action. *Ferris v. Thaw*, 5 Mo. App. 279; s. c., 72 Mo. 446; *Heath v. Goslin*, 80 Mo. 310; *Blakely v. Bennecke*, 59 Mo. 193; *Richmond v. Judy*, 6 Mo. App. 469. The contract made was essentially necessary to the furtherance of the objects of the association, and all members were presumptively bound. *Richmond v. Judy*, 6 Mo. App. 468; *Sizer v. Daniels*, 66 Barb. 426. A principal is bound by the acts of his agent within the scope of his apparent authority, although the agent's acts are in violation of the undisclosed limitations of his authority. *Sumner v. Saunders*, 51 Mo. 89; *Baker v. Railroad*, 91 Mo. 152; *Brownfield v. Ins. Co.*, 26 Mo. App. 390; *Jackson v. Ins. Co.*, 27 Mo. App. 62; *Kinealy v. Burd*, 9 Mo. App. 359. The contract was not in violation of the laws against Sabbath breaking. *More v. Clymer*, 12 Mo. App. 11; *Kaufman v. Ham*, 30 Mo. 387; *Glover v. Cheatham*, 19 Mo. App. 656; *State v. Carpenter*, 62 Mo. 594; *People v. Dennin*, 35 Hun. 327; *St. Louis v. Laughlin*, 49 Mo. 559; *Knox City v. Thompson*, 19 Mo. App. 523; *Sandiman v. Breach*, 7 Barn. and Cress. 96.

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The invalidity or illegality of a contract must be pleaded; it cannot be shown under a general denial. *Cummiskey v. Williams*, 20 Mo. App. 606; *Sybert v. Jones*, 19 Mo. 86; *Musser v. Adler*, 86 Mo. 445; *Moore v. Ringo*, 82 Mo 469. An appellate court will not consider a defense not relied upon at the trial and not pleaded by the defendants. *Wheeler v. Ins. Co.*, 6 Mo. App. 241; *Walker v. Owen*, 79 Mo. 568; *Barker v. Berry*, 8 Mo. App. 446.

THOMPSON, J., delivered the opinion of the court.

The petition states that the plaintiff "is a corporation, incorporated under the laws of the state of Missouri, and that the defendants, together with persons unknown to the plaintiff, are and were at the times hereinafter stated members of a voluntary association known as the Amateur Athletic Association of St. Louis; that the purpose of said association is to develop and encourage athletic games and sports. The plaintiff further states that it is the owner of a parcel of ground in the city of St. Louis, generally known and designated as the St. Louis Fair Grounds, which parcel of ground is bounded on the east by Grand avenue, on the south by the Natural Bridge road, on the west by Fair avenue, and on the north by Kossuth avenue, in the city of St. Louis. Plaintiff further states that on or about Wednesday, the seventh day of September, 1887, the said association, and defendants as members thereof, proposed to plaintiff to rent from the plaintiff the premises above described, to be used by its members and other persons invited by them, on Sunday, the twenty-fifth day of September, 1887, for the athletic games and other purposes of said association. Plaintiff further states that, in pursuance of such proposal, it did, on or about the seventh day of September, 1887, let and rent to said association and the defendants, as members thereof, the premises aforesaid, to-wit, the said fair grounds and a structure erected thereon known as the

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amphitheater, for one day, to-wit, the twenty-fifth day of September, 1887, in consideration of the agreement of said Amateur Athletic Association and of the defendants, members thereof, to pay to said plaintiff the sum of one thousand dollars in cash for the use of said premises on said last-mentioned day. Plaintiff states that said Amateur Athletic Association, and said defendants as members thereof, did use and occupy the said premises on the said twenty-fifth day of September, 1887, in accordance with said agreement, but they have failed to pay to said plaintiff the said sum of one thousand dollars, although payment thereof has been duly demanded of them on the first day of October, 1887. Wherefore plaintiff asks judgment," etc.

The defendants answer by a general denial. A trial was had before the court sitting as a jury, which resulted in a finding and judgment in favor of the plaintiff in the sum of ten hundred and thirty-five dollars. Four of the defendants, Delano, Parrish, Skerrett and Sievers, prosecute this appeal. They assign for error at the outset that the contract sued on is illegal and void, because it involved a letting of the plaintiff's grounds for games which were to be performed on Sunday, and for work which was to be done on Sunday. In response to this assignment of error, the respondent directs our attention to the fact, that this defense was not raised in the trial court at any stage of the proceedings, either by the answer or by a request for instructions. The defendants, by way of rejoinder, claim that the question arises upon the face of the petition, and hence that it is available on error or appeal; since, if the petition counts upon a void contract, it does not state a cause of action. Undoubtedly, if the contract, as described in the petition, directly involved the doing of something prohibited by law, the petition fails to state a cause of action, and this objection is available at any time, and may be made for the first time in an appellate court. But, if the petition states a contract

valid on its face, or valid as therein described, but which may nevertheless be invalid by reason of something arising upon extrinsic evidence, or by reason of the contract as proved at the trial being different from the contract as alleged in the petition,—then, in order to bring the question of the invalidity of the contract under review on error or appeal, that question must have been raised in the trial court; because it is a well settled rule of procedure that a case cannot be tried or defended upon one theory in the trial court, and upon another in the appellate court. And, in general, if the petition states a contract valid on its face, but which may be invalid by reason of some extrinsic matter, that extrinsic matter must be pleaded in order to make it an issuable question at the trial, and in order to make it a question which can be considered upon appeal. *Cummiskey v. Williams*, 20 Mo. App. 606; *Sybert v. Jones*, 19 Mo. 86. Unless, therefore, this question arises on the face of the petition, it is not before us for consideration, for it does not appear to have been raised by the defendants in any form in the trial court.

The petition states, "that the purpose of said association is to develop and encourage athletic games and sports." It further states that the purpose for which the fair grounds were rented to the defendants was, "to be used by its members and other persons to be invited by them, on Sunday, the twenty-fifth day of September, 1887, for the athletic games and other sports of said association." It states that the defendants "did use and occupy the said premises on the said twenty-fifth day of September, 1887, in accordance with said agreement." Unless, therefore, we have some statute prohibiting "athletic games and sports" on Sunday, this petition is not bad by reason of the fact that it counts on a contract involving the doing of some prohibited act. No statute has been pointed out to us which prohibits in terms an exhibition of athletic games and sports on Sunday, and we know of the existence of no such

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statute. Section 1578 of the Revised Statutes prohibits *labor* on Sunday, except works of necessity and charity; but this petition does not imply that any labor was necessarily to be done upon the grounds let by the plaintiff to the defendants on the day named. Section 1580 prohibits horse-racing, cock-fighting, or playing at cards *or games of any kind* on the first day of the week commonly called Sunday; but this court is of opinion that this prohibition is against games of chance or other games of an immoral tendency, and that it does not involve a prohibition of athletic games or sports, which are not of an immoral tendency, but which tend to the physical development of the youth, and are rather to be encouraged than discouraged. Penal statutes are to be construed strictly. It is an established principle of construction that where general words follow particular ones, they are to be construed as applicable to the things or persons particularly named (*City of St. Louis v. Laughlin*, 49 Mo. 559, 563); or, as it is sometimes expressed, "where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis.*" Lord TENDERDEN, in *Sandiman v. Breach*, 7 Barn. & Cres. 96—a case which well illustrates the principle in its application to a statute prohibiting work and labor on Sunday. This rule of interpretation is somctimes expressed in the maxim *noscitur a sociis*, the meaning being that a word shall be known by the character of its companions. In *Knox City v. Thompson*, 19 Mo. App. 523, 526, the rule is stated and illustrated. In a recent work of great merit the word "game" is defined to be "a device or play, the terms of which are that the winner shall receive something of value from the loser; the act of playing a game for stakes." Anderson Law. Dict., *verb*—game. In *Portis v. State*, 27 Ark. 362, gaming is said to be "the risking of money between two or more persons, on a contest or chance of any kind, where one must be the loser and the other must be the gainer." Many other decisions

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emphasize the principle that, by the words, game and gaming, are understood the playing or contesting at something which depends upon *chance*, or in which chance is an element. *Bew v. Harston*, L. R. 3 Q. B. Div. 456; *Bell v. State*, 5 Sneed. (Tenn.) 509. The word game is no doubt susceptible of being used in a sense large enough to embrace any contrivance or institution intended to furnish sport, recreation or amusement. But this is not its usually understood meaning when employed in a statute which constitutes it an indictable offense. In such a case it is usually understood to imply some species of gambling. 2 Whart. Crim. Law., sec. 1465*b*.

We are, therefore, of opinion that the "games" prohibited by section 1580 of the Revised Statutes are gambling games, and not athletic games and sports, and consequently that this petition does not predicate a right of recovery upon a contract involving the doing of a prohibited act. If there was evidence tending to show that the contract was necessarily executed in such a manner as to involve the doing on Sunday of acts prohibited on that day, that, as we have already stated, was matter which we cannot consider, because it was in no manner brought to the attention of the court below.

II. The next assignment of error relates to the defendants Delano and Parrish. It is, that there was evidence to support the verdict as against them. It is to be observed, with reference to this assignment of error, that there was no evidence of the constitution or by-laws of the voluntary association known as the Amateur Athletic Association, which was the body in behalf of which the fair grounds were rented for the day in question. There was, therefore, no evidence of an authority on the part of all the members of the association to the board of directors as a body, or to the members of the association who negotiated the contract in question, to bind all the members of the club by such a contract. Such being the case, the liability of any one of

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the defendants must rest upon one or more of three grounds: (1) That the particular defendant bound himself by the contract; or (2) that he authorized some other person to bind him by it; or (3) that he ratified it after it was made by some other person purporting to act in his behalf. It was upon this principle that the court tried and decided the case, as shown by the declarations of law given.

It should also be stated, to make this assignment of error clear, that there is no controversy about the fact that *a contract* was made by *some of the defendants*, who claimed to act for the Amateur Athletic Association, with the plaintiff, through Mr. Green, its president, for the renting of the ground to the association on Sunday, the twenty-fifth of September, 1887, for an exhibition of athletic games and sports intended by the association. There is no controversy that the grounds were thus used by the association, and that neither the association, nor any of the defendants, have paid the plaintiff anything for the use of them. The controversy is as to what the contract really was. The plaintiff's version of the contract, supported by its evidence, roughly stated, is that the plaintiff made to the defendant two alternative propositions: (1) To rent the grounds to the association on the day stated for the round sum of one thousand dollars, or (2) to rent it to them for one-half of the gate money. According to the plaintiff's evidence, the defendants accepted the former proposition. On the other hand, the defendants' version of the contract was that Mr. Green, acting for plaintiff, made to certain representatives of the association the following alternative propositions: (1) To rent the grounds to them on the day named for one thousand dollars *of the gate money*, the balance to go to the club; or (2) to rent it to them for one-half of the gate money. The defendants' evidence also tended to show that the association accepted the first of these propositions, as they are thus stated.

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We understand that there is no controversy about the further fact that it was understood between the parties that, if it should rain on the day on which the grounds were let to the association, so that the exhibition proposed by the association should not take place, nothing was to be charged for the grounds.

It is thus seen that the substantial controversy of fact between the parties was as to the nature of the first proposition which Mr. Green made to them, and which they accepted. The learned judge of the trial court gave an opinion, or rather a memorandum of his reasons, for deciding this question of fact in favor of the plaintiff. He found that the positions of the opposing parties were supported by the evidence of witnesses equally credible. But he gave weight to the undisputed fact, that, instead of turning over the gate money (which was less than one thousand dollars) to the plaintiff, all of which belonged to it under the terms of the contract, as the defendants stated it, the treasurer of the club deposited it in a bank, and it was all checked out and disbursed for other expenses of the club. This circumstance was certainly entitled to great weight. These gentlemen, members of this club, were honest men. If the contract was as they claim it to have been, the gate money, to the extent of one thousand dollars, belonged the plaintiff. If it came into their hands, they held it in trust for the plaintiff. If a contract is made to pay a debt out of a particular fund, the contract impresses with the nature of a trust so much of the fund as is necessary to pay the debt, and, if the whole fund would be required to discharge the debt, the whole is by the contract impressed with the character of a trust fund; in other words it belongs to the creditor. These views would seem to justify the finding of the trial court as against such of the defendants as made the contract, or authorized others to make it, or ratified it after it was made. The question remains whether Mr. Delano and Mr. Parrish were of these defendants.

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Mr. Delano was president of the club. He was present at the interview which took place between Mr. Green, as president of the plaintiff corporation, and several of the defendants who professed to act for the club, at which interview the contract was made. Whatever proposition was then made by Mr. Green,—whether it was the proposition as Mr. Green understood it, or whether it was the proposition as the defendant understood it,—Mr. Delano heard it. Then, after the proposition had been accepted by a vote of the directors of the club, Mr. Delano visited Mr. Green and endeavored to get better terms for the club. He testifies that when he made this visit he still understood Mr. Green's first proposition, which the club had accepted, to be one thousand dollars out of the gate money. But the fact remains that he was one of the negotiaters of this contract, and also that he was present at the exhibition and distributed the prizes in his character of president of of the club; and hence, whatever the contract was, it was binding upon him, either upon the theory of having originally made it, or having ratified it with knowledge.

The court has found what it was, in accordance with what seems to be a preponderance of the evidence. This being an action at law, we are not, however, concerned with the question, whether there is a preponderance of evidence supporting the conclusion of the court; it is enough for us to see that it is supported by substantial evidence, and of this there is no doubt.

Then as to the liability of Mr. Parrish, under the evidence. It should be stated that the evidence tends to show that Mr. Parrish was also present at the meeting at which the two alternative propositions were made by Mr. Green. The testimony of one of the plaintiff's witnesses, also, is to the effect that Mr. Parrish stated to him that he understood that the club had accepted the one-thousand-dollar proposition,—that is, the first proposition which Mr. Green made. Mr. Parrish was

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also present at the exhibition. These facts, we think, justify the court in concluding that he was affected with a knowledge of the terms of the contract, whatever it was, and also that he ratified it with knowledge of its terms.

III. It is also assigned for error that against, the objection of the defendants, the court admitted in evidence the following letter:

"RUFUS J. DELANO, Attorney at Law,
"S. E. COR. FIFTH AND OLIVE STS.,

"ST. LOUIS, October 28, 1887.

"*Chas. Green, Esq., St. Louis, Mo.*

"DEAR SIR:—In reference to the adjustment of whatever sum of money it may be found is owing to you on account of the Sunday meeting and contract of the St. L. A. A. Club at the fair grounds, I will state that it has taken the athletic association some time to get in the accounts of the sale of tickets by their members, and, therefore, until the last few days the club has not known their financial standing. I have been very busy in the past few days; therefore, I have not been able to call on you; I will do so to-morrow or Monday. I might as well speak plainly in saying that there is strong dissatisfaction upon the part of the club as to various representations made by you in reference to the grounds, average Sunday receipts, etc., which will necessarily cut a figure in the adjustment of the amount due by the club.

"They desire to pay what they justly owe.

"Respectfully,

"RUFUS J. DELANO."

This letter was objected to upon the grounds that it appears to have been written in regard to an offer of compromise of the claim in dispute, and that it is incompetent, immaterial and irrelevant. So much of the objection as challenges it on the general grounds of its being "incompetent, immaterial and irrelevant,"

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may be laid out of view, because it did not direct the attention of the court to the respect wherein it was challenged as either incompetent, immaterial or irrelevant. It has often been held that objections of this general character are unavailing. *Ecton v. Continental Ins. Co.*, 32 Mo. App. 53; *Schmucker v. Spelbrink*, 25 Mo. App. 356; *Taussig v. Schields*, 26 Mo. App. 323; *Bank v. Westlake*, 21 Mo. App. 569, 572; *Johnson v. Railroad*, 22 Mo. App. 600. The objection that it was written in relation to an offer of compromise was not well taken. There was clearly nothing on its face which imported this, nor was it shown by extrinsic evidence that such an offer was pending, or proposed, at the time when the letter was written. It was admissible, on any theory, against the defendant Delano, and, although it may not have been binding upon such of his co-defendants as he did not represent, the fact that it was admissible as against him warranted its introduction in evidence. The defendants against whom it was not admissible might have had its effect limited by an instruction, if they had so desired. An instrument of evidence which is admissible as against one defendant cannot be ruled out entirely on the ground that it is not admissible as against a co-defendant.

IV. These are all the assignments of error which have been argued in the printed statements and briefs submitted. Among the appellants' "points" there is a fourth point stated, namely, that the court erred in refusing certain instructions and in giving certain others. In the absence of any argument of this point, we think it sufficient to say that an examination of the declarations of law which were given shows that the court tried the cause on the proper theory. As the instructions are not numbered in the record, we do not really know to what instructions the defendants refer in the statement of this point, and we shall, therefore, dismiss the subject.

The judgment will be affirmed. But the decision

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of this court being opposed to the decision of the Kansas City court of appeals in the unreported case of *State v. Williams*, it is ordered that this case be certified to the supreme court for final disposition, in pursuance of the constitutional mandate. Judge BIGGS concurs. Judge ROMBAUER does not sit.

CONCURRING OPINION.

BIGGS, J.—I think the letter from R. J. Delano to Charles Green, the president of plaintiff, was properly read in evidence, but I cannot agree with Judge THOMPSON that the objections made by the defendants to its admission were not sufficient.

If there was any *special* objection to be urged, then it was the duty of the defendants to point it out, and if they failed to do so, such an objection could not be urged in the appellate court. *Buckley v. Knapp*, 48 Mo. 152; *Adler v. Lang*, 21 Mo. App. 519. But when the objection goes to the subject-matter of the testimony offered as "immaterial and irrelevant," I think the general objection is sufficient.

It is impossible in many cases to specify or point out wherein testimony in a given case is "incompetent, immaterial and irrelevant" without going into an examination and full discussion of the pleadings. Such an objection is fair to the opposite party and to the trial court, for the reason that the pleadings determine the issues to be tried, and the validity of such an objection must be determined from an inspection of the issues. If the evidence offered has no tendency to prove or disprove any issue in the case, then it may be said that it is "incompetent, irrelevant and immaterial." The means afforded for the determination of such a question is a matter of record and open to all.

The letter was competent and relevant testimony against the defendant Delano, and hence the court did right in disregarding defendants' objection.

In all other matters, I concur in the opinion as written.

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ANTONIO CANGAS, Respondent, v. L. M. RUMSEY MANUFACTURING COMPANY, Appellant.

St. Louis Court of Appeals, June 4, 1889.

1. **Contract.** To constitute a contract, a proposal must within a reasonable time be accepted as made; the acceptance must comprehend the entire proposal without qualification of its terms or subject-matter.

2. ——. A mere intention to accept the proposal, not communicated to the person making the proposal, is not equivalent to an acceptance, and will not bind the contract.

Appeal from the St. Louis City Circuit Court.—HON. SHEPARD BARCLAY, Judge.

REVERSED, (*with judgment for appellant.*)

Lee & Ellis, for the appellant.

(1) The evidence in this case does not establish any contract between the parties to this suit. The mere proposal or order by one party to another, which is not accepted, constitutes no bargain between them. If the offer by a vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is then at an end, and the party to whom the offer was made cannot afterwards bind the intended vendor by simply accepting the first offer. Benj. Sales [Bennett's Ed.] sec. 39, and cases cited; *Baker v. Johnson Co.*, 37 Iowa, 186; *Alsberg, Jourdan & Co. v. Latta*, 30 Iowa, 442; *Hyde v. Wrench*, 3 Beav. 336; 1 Pars. Cont. [7 Ed.] bot. p. 507; *Jenness v. Iron Co.*, 53 Me. 20; *Burmester v. Phillips*, 25 Fed. Rep. 805; *Snow v. Miles*, 3 Cliff. 608; *Brown v. Rice*, 29 Mo. 322; *Stitt v. Huidekoper*, 17 Wall. 384; *Schenectady Co. v. Holbrook*, 101 N. Y. 45. (2) The only authority conferred upon appellant, under the

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correspondence read in evidence, was that of an agent for the purchase of the machines in controversy.

W. B. Homer, for the respondent.

(1) The evidence in the case establishes a contract between the parties to the suit. 1 Pars. Cont. [7 Ed.] star p. 483; *Stotesberg v. Massengale*, 13 Mo. App. 221; *Bruner v. Wheaton*, 46 Mo. 367; *Mfg. Co. v. Broderick*, 12 Mo. App. 378. (2) The contract in question was a contract of sale and purchase, and not that of principal and agent.

Biggs, J., delivered the opinion of the court.

The plaintiff sues the defendant for non-delivery of twenty D. M. Osborne, No. 8 reaping machines, and claims four thousand dollars damages.

The plaintiff is a merchant and citizen of the republic of Mexico, and the defendant is a business corporation engaged in the hardware business in the city of St. Louis.

The petition contains two counts but they relate to the same subject-matter.

The plaintiff in substance alleges that the defendant for a consideration contracted to deliver to him twenty D. M. Osborne, No. 8 reaping machines, for which he had agreed to pay the sum of sixteen hundred and twenty dollars; that the machines were to be delivered to the transportation company at St. Louis on or before the twenty-eighth day of February 1886; that it was understood at the time when the contract was made that the plaintiff had sold the machines to other parties in Mexico, and that they were to be shipped in time to reach him for the harvest of 1886; that, on the twenty-eighth day of February, the plaintiff paid to the defendant, on account of this purchase, the sum of two thousand dollars; and that on the fifth day of March the defendant informed the plaintiff that it could not

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perform the contract because the factory, manufacturing the machines, refused to deliver them to defendant. Then follow allegations of sales of machines by plaintiff to parties in Mexico, and that the plaintiff was unable to procure elsewhere the machines to fulfill his said contracts.

The defendant by its answer denied all the averments in the petition, and then in substance alleged that it had been acting merely as an agent for the plaintiff in the purchase of the machines; that it did not manufacture or sell the reapers and could only buy them from the manufacturer, all of which was known to the plaintiff; that the machines were manufactured by D. M. Osborne & Co., of the state of New York, and that Osborne & Co. had agreed with the defendant as the plaintiff's agent to furnish the machines, but afterwards refused to do so, for the reason that they had agreed with one of their agents not to sell machines within the territory of the republic of Mexico.

Upon the issues thus framed, the parties proceeded to a trial. The cause was submitted to the court sitting as a jury, and resulted in a judgment for the plaintiff in the sum of $2187. From this judgment the defendant has prosecuted this appeal and has assigned many reasons why the judgment cannot be upheld.

The first error complained of is the action of the trial court in holding that the evidence was sufficient to establish a contract between the plaintiff and the defendant for the delivery of the machines. The defendant asked the court to instruct to the contrary, which was refused, and the defendant saved its exception to the ruling of the court. This assignment challenges the plaintiff's right to maintain this action, and, as it lies at the threshold of the case, we will first consider it. If the defendant is right, then the consideration of the other questions arising on the record will necessarily be dispensed with. In our discussion, we will assume, for the purpose of the argument,

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that in the alleged purchase of the machines the defendant was not acting as the agent of the plaintiff.

As we read the record, there seems to be no claim or pretense that any part of the alleged contract rested in parol, but the contract (if any was made) was evidenced by letters written by the plaintiff and the defendant to each other.

It appears that in October, 1885, the plaintiff visited the city of St. Louis and made some purchases from the defendant in its line of business; that in November, 1885, the plaintiff, after his return home, wrote to the defendant that he was informed that a machine made by D. M. Osborne & Co., of New York, was sold in St. Louis; that he asked the defendant to inform him of the cash price of those catalogued as Nos. six and eight; that the defendant replied that the price of the No. 8 Osborne reaping machine was eighty-one dollars delivered on the cars in the city of St. Louis; that the result of this correspondence was the shipment by the defendant to the plaintiff of two No. 8 machines at eighty-one dollars each.

It also appears from the correspondence, and from other evidence, that Osborne made a different machine for the Mexican trade, and that the plaintiff was advised by the defendant, that these machines could *only* be obtained from the factory in the state of New York.

This statement of the prior transactions between the parties is necessary to a full understanding and explanation of the subsequent correspondence, out of which this litigation has arisen.

After the first purchase, the plaintiff, with a view of further importations of machines, addressed the following letter to the defendant:

"IRAPUATO, December 30, 1885.

"*L. M. Rumsey Manufacturing Co., St. Louis, Mo.*

"GENTLEMEN:—Your favor of the eighteenth inst. came duly to hand and contents noted. I wish to import into this country several reaping machines and

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would like to know the price of Osborne's light steel frames No. 11, and also the light reaper and binder of the same factory. I desire to do this transaction as an agent to speculate on it, and I would like to get your quick answer so as to remit the order and necessary funds if satisfactory, but in all this there must be no delay. I see by the newspapers that railroad freights have been greatly reduced, which will be very favorable for my undertaking. Trusting you will act as my agents in this matter, I remain,

"Very truly,

"ANTONIO CANGAS"

This letter was not answered by defendant.

On the tenth day of January, 1886, the plaintiff again wrote to the defendant, as follows:

"IRAPUATO, January 10, 1886.

"*L. M. Rumsey Manufacturing Co., St. Louis, Mo.*

"GENTLEMEN:—I wish to import here twenty D. M. Osborne & Co., of New York, No. 8 reapers, and also ten William Deering reapers, as shown in third page of your catalogue and called "Deering Light Reaper." In order to make a success of this importation it is absolutely necessary that they be shipped for this country on or before the twenty-fifth day of February of this year, for it will not be advantageous to make said importation after said date. It is therefore the object of this letter to ask you if you can remit said thirty machines by the date above named, and if you can do so, to have them ready and advise me of same immediately, so as to remit the necessary funds, but I repeat that the transaction would not be suitable unless it can be done by the date already mentioned. I have not heard from those, already ordered but suppose they are on the way already. I write to-day to H. G. Gonzales sending him copy of this letter, so taht he may translate exactly to you its contents. I remain,

"Very truly,

"ANTONIO CANGAS."

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On the twenty-first day of January, the defendant wrote to the plaintiff, and that portion of the letter, which is in answer to the plaintiff's letter of January 10, is as follows:

"St. Louis, January 21, 1886.

"*Mr. Antonio Cangas, Irapuato, Mexico.*

"Dear Sir:—We received your letter of the tenth in regard to the thirty machines and fully understand it. We also understand the letter written to Mr. Gonzales about the machines. We would state that we cannot furnish you the Deering machines, but can furnish you the twenty No. 8 Osborne machines, and can ship them from the U. S. before the twentieth of February. This is what the factory informs us. We may be able to ship these machines as a car load and thus obtain lower rate of freight. We will furnish you a No. 11 light steel frame Osborne Harvester and Binder for one hundred and forty-nine dollars. We shall be highly pleased to receive your order for the twenty machines, and shall use our best endeavors to ship them promptly.

"Yours very truly,

"L. M. Rumsey Mfg. Co."

On the twenty-third of January, 1886, the defendant again wrote to the plaintiff, as follows:

"St. Louis, January 23, 1886.

"*Mr. Antonio Cangas, Irapuato, Mexico.*

"Dear Sir:—Since writing to you two days ago in regard to the reaping machines we would state that we have made arrangements with Deering & Co., and will be able to furnish you ten of their reaping machines for eighty-five dollars each, which will be the price at the factory. In case you order, we will use every effort to get low freight and will ship as promptly as possible. Trusting you may favor us with your order, we remain,

"Very truly yours,

"L. M. Rumsey Mfg. Co."

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On the twenty-ninth day of January, 1886, the plaintiff wrote to the defendant, as follows:

"IRAPUATO, January 29, 1886.

"*L. M. Rumsey Mfg. Co., St. Louis, Mo.*

"GENTLEMEN:—I am favored by yours of the twenty-first inst. and see by it that the machines I bought of you are on the way and will be here soon. Also I notice that the freight amounts to $71.95 instead of thirty-two dollars, as you stated in one of your letters. I believe that must have been a mistake as I really thought the freight too low at said figure. I owe you, therefore, a balance of $35.20 which I will soon remit to you.

"Circumstances have changed considerably from what I had proposed, not only on account of double freight, but also on account of the falling in price of the Mexican money in the markets of the U. S., and I am somewhat thwarted thereby in regard to importing the reapers. However, I may conclude to make the experiment if you can give me a discount of at least ten per cent. on their total value. Under this agreement you may give the order to the factory to be getting them ready at once, giving me notice so as to remit to you at once their value either in Mexican coin or by New York draft. All this based on the point already mentioned of their being shipped on the twentieth of February.

"Awaiting your answer, I remain,

"Yours, etc.,

"ANTONIO CANGAS."

On February 5, 1886, the defendant, in reply to the letter of January 29, wrote to the plaintiff as follows:

"ST. LOUIS, February 5, 1886

"*Mr. Antonio Cangas, Irapuato, Mexico.*

"DEAR SIR:—We are just in receipt of your esteemed favor of the twenty-ninth of January and carefully note contents of same. In our first letter to you

in regard to the freight on the reaping machine the factory said the weight of each machine was one thousand pounds and that the rate of freight being $3.20 per hundred pounds would make the freight on each machine thirty-two dollars.

"We wrote to you the weight of one machine instead of two, that was the mistake we made. When we came to ship the machines we found they weighed a little over a thousand pounds each, but the rate of freight was the same exactly $3.20 per hundred pounds. You say that we may ship the reaping machines if we will discount the price ten per cent. This we could not do as we have made you very lowest prices, just leaving us a small margin. Besides we had a good deal of trouble to get the factories to allow us to ship them.

"We would be pleased to ship them, but could not do so at a discount of ten per cent. from the prices we made you.

"We remain with much respect,

"Yours very truly,

"L. M. RUMSEY MFG. CO."

On the fourteenth day of February, the plaintiff again wrote to the defendant, as follows:

"IRAPUATO, February 14, 1886.

"*L. M. Rumsey Mfg. Co., St. Louis, Mo.*

"GENTLEMEN:—Yours of the fifth just to hand this day. I learn by it that you cannot allow the discount of ten per cent. on the twenty Osborne machines which I ask of you. However, I have decided to try this speculation, and I have this day written to my correspondent in the city of Mexico, instructing him to remit draft at suitable rate of exchange on some city in the U. S., or to ship direct to you Mexican silver to sell it and pay for the machines.

"In view of what I have written you before, I earnestly request of you to order the factory to hasten their shipping arrangements, so that as soon as you

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receive their value, which I will remit next week at latest, they ship them. The five Deering machines I do not want. I owe you $35.20, which I will include in the remittance above stated. I remain,

"Very truly,

"ANTONIO CANGAS.

The defendant made no reply to this letter.

On the fifth day of March, the defendant sent to the plaintiff the following telegram, to-wit:

"Factory refuses to furnish machines, money here subject to your order; see letter.

The letter referred to in the telegram is as follows:

"ST. LOUIS, March 5, 1886.

"*Mr. Antonio Cangas, Irapuato, Mexico.*

"DEAR SIR:—We just telegraphed you to-day that the factory refused to furnish us the twenty No. 8 Reaping Machines, and that your money was here subject to your order. We can assure you that we regret exceedingly our inability to get these machines for you.

"When you first requested a price of them we wrote the factory and received a letter from them dated, January 19, stating they could furnish us the machines and could ship promptly; but after your order came in, they refused to let us have them, as the trade for Mexico is controlled by some other agent. We used every possible endeavor to secure them, had the manager come down to our office and had him telegraph and write the factory several times. We received a letter this morning from D. M. Osborne & Co., stating that they will be unable to ship the machines; this of course settles the matter. We have the two thousand dollars Mexican silver, which you sent us. Please advise us what disposition to make of the money. We are very sorry to disappoint you in this matter, but the circumstances were such that we could not possibly make the shipment. Yours very truly,

"L. M. RUMSEY MFG. CO."

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After the date of the letter of February 14, the plaintiff wrote the defendant, as follows:

"IRAPUATO, February 17, 1886.

"*L. M. Rumsey Mfg. Co., St. Louis, Mo.*

"GENTLEMEN:—Referring to my letter of the fourteenth inst., I enclose Wells, Fargo & Co.'s express order for one thousand Mexican dollars to be sold. Next week I will remit you the balance of the price of machines ordered from you.

"I remain, very truly,

"ANTONIO CANGAS."

"IRAPUATO, February 19, 1886.

"*L. M. Rumsey Mfg. Co., St. Louis, Mo.*

"GENTLEMEN:—Referring to my letter of the seventeenth inst., I enclose Wells, Fargo & Co.'s express order for one thousand Mexican dollars to be added to the former one thousand and sold, and the proceeds to be applied to the paying for twenty machines I have ordered. The freight on these machines must be paid here, and, as I understand, it must be paid in American money.

"I request of you very earnestly to see that they write on the margin B. L. the exact rate of exchange on Mexican money. This is a very important requisite. According to my letter of the fourteenth I expect the machines will soon be ready for shipment, and I beg of you that it be done with the utmost possible speed, because all delay in shipping beyond the tenth of March will be extremely injurious to me, and perhaps I will not be able to sell them this year. I therefore rely upon your reliability and earnestness for their shipment.

"Very truly yours,

"ANTONIO CANGAS."

There was other correspondence after March 5, but we do not deem its subject-matter material to the determination of the legal question arising out of the foregoing letters.

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The law in respect to contracts entered into by letter or telegraphic correspondence is well understood and settled both by the state and federal courts. There is a remarkable unanimity in all of the authorities as to the necessary elements of such contracts, *i. e.*, what is necessary to be done by the contracting parties, before it can be said that a legal contract has been entered into.

If one person by letter proposes to bind himself by contract and states the subject-matter and terms of the contract, the party, to whom the proposition is made, must, within a *reasonable time* after the receipt of the letter, *accept* the proposition *as made.* The acceptance must *comprehend* the entire proposition and must not qualify its terms or subject-matter. If the acceptance in any material way differs from the original proposition, it amounts to a *rejection of the offer. Alsberg v. Latta*, 30 Ia. 442; 1 Parson on Contracts [5 Ed.] 475; *Baker v. Johnson Co.*, 37 Ia. 186; Benjamin on Sales [Benn. Ed.] p. 43; 1 Pars. Con. [7 Ed.] bot. p. 507; *Snow v. Miles*, 3 Cliff. 608; *Hyde v. Wrench*, 3 Beav. 336; *Burmester v. Phillips*, 25 Fed. Rep. 805; 1 Addison on Contracts, star pp. 17, 18; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45. The adjudicated cases in this state are in harmony with the foregoing authorities, and they announce but one doctrine.

In *Falls Wire Co. v. Broderick*, 12 Mo. App. 383, Judge BAKEWELL said: "There can be no valid contract unless the parties thereto assent to the same thing in the same sense. An absolute acceptance of a proposal coupled with any qualification or condition is not to be regarded as a complete contract." The same law is declared by Judge WAGNER in *Eads v. City of Carondelet*, 42 Mo. 113.

In *Brunner v. Wheaton*, 46 Mo. 363, the court says: "In order that an acceptance may be operative, it must be unequivocal, unconditional and without variance of any sort between it and the proposal, and it must be

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communicated to the other party without *unreasonable delay.*" To the same effect is *Stotesberg v. Massengale,* 13 Mo. App. 221.

When we come to apply this law to the correspondence between the plaintiff and the defendant, it is very evident that the plaintiff's letter of January 29 was *not* an acceptance, but a *rejection* of the defendant's offer contained in his letter of January 21. The defendant in this letter offered to furnish twenty No. 8 Osborne machines but stated that he could not furnish the "Deering Machines," as requested by plaintiff in his letter of January 10. There was no price fixed on the Osborne machines in the letter of January 21 because that had already been ascertained by the parties, in the previous purchase, to-wit: Eighty-one dollars delivered on cars in St. Louis.

The plaintiff, in his letter of January 29, wrote to the defendant that he could not accept his offer, unless *ten per cent. was deducted from the price.* He gave as reasons for this the depreciation of the value of Mexican silver in the markets of the United States and the high freight rates. We do not understand that counsel for the plaintiff contends that this was not an absolute and unqualified rejection of the defendant's offer. But he urges that the defendant, in its reply of February 5, renewed the original offer, and that this last offer was promptly accepted by the plaintiff in his letter of February 14. The portion of the defendant's letter under date, February 5, which plaintiff says was tantamount to a renewal of the first offer, is as follows: "You say that we may ship the reaping machines if we will discount the price ten per cent. This we could not do, as we made you very lowest prices, just leaving us a small margin. Besides we had a good deal of trouble to get the factories to allow us to ship them. We would be pleased to ship them, but could not do so at a discount of ten per cent. from the prices we made you." The language employed does not of itself amount to a

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new offer, nor can we say that the defendant intended to leave his first offer open for future acceptance. It is evident that the plaintiff understood it either in the one way or the other, but the question is, did he have reasonable grounds to place any such construction or meaning on the defendant's language?

In determining what the defendant really meant, it will be necessary and quite proper to look at the circumstances and conditions attending the negotiations between the parties. The plaintiff, in his letter of January 10, wrote: "*In order to make a success of this importation, it is absolutely necessary that they be shipped for this country on or before the twenty-fifth day of February of this year, for it will not be advantageous to make said importation after said date.*" The plaintiff, also, in his letter of the twenty-ninth, in which he authorized the defendant to ship the machines, provided a discount of ten per cent. was allowed, wrote: "*All this based on the point already mentioned of their being shipped on the twentieth of February.*"

The defendant received this last letter on the fifth, and answered it on the same day. It is unreasonable to suppose, as contended by the plaintiff, that the defendant intended by this answer to renew its first proposition, because it certainly understood that it was a matter of vital importance to the plaintiff that the machines should be shipped from St. Louis by the twentieth of February. It could not expect a reply to this letter of the fifth before the twentieth or twenty-first of February, which would have made it impossible for it to ship the machines within the time stipulated. It must also be borne in mind that the defendant could not buy the Mexican machines in the St. Louis market, but would have to order them from the factory in New York. It is more reasonable to conclude (and the language of the defendant's letter justifies the conclusion)

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that the defendant considered its negotiations with plaintiff at an end.

Under this view of the case, we will have to treat the plaintiff's letter to the defendant under date, February 14, as containing a new proposition or offer. In order to bind the defendant by this last offer, it devolved on the plaintiff to show an acceptance by defendant. This the plaintiff failed to do. The defendant made no answer to the plaintiff's last letter, and after the fourteenth there was no communication between the parties until the fifth day of March, when the telegram was sent to the plaintiff, stating that Osborne & Co. refused to sell the machines. It may be contended and urged that, notwithstanding that there is no evidence of an actual acceptance by the defendant, yet there *is* evidence of *an intention* to fill the order, otherwise defendant would not have remained silent and by its silence left plaintiff to infer that it did intend to ship the machines. We think the evidence tends to show that defendant *intended* to ship the machines *provided* it could get them from the factory.

On the twenty-first of January, the defendant had made arrangements with Osborne & Co. to buy the machines, provided that the order was received by it from the defendant. It was certainly contemplated by the defendant and Osborne that the plaintiff's order must be secured within a reasonable time, which in this case would be about fifteen days. This would have afforded the defendant time to correspond with the plaintiff. But the defendant did not receive the plaintiff's last letter containing the final offer until the twentieth or twenty-first of February, over one month after the first agreement with Osborne & Co. After this lapse of time, it was reasonable that the defendant should decline to bind itself by accepting the last offer of the plaintiff, until it had renewed its contract with Osborne & Co. To this extent, we think it may be said,

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that the defendant *intended* to accept the plaintiff's last proposition. But this *intention* was in no way communicated to the plaintiff, and we do not think that such an intention uncommunicated to the plaintiff would constitute an acceptance of the offer made, so as to bind the defendant.

The case of *Jenness v. Mt. Hope Iron Co.*, 53 Me. 23, presented a similar state of facts. The court said: "The learned counsel for plaintiff admit that the letters do not probably of themselves constitute a contract, but they insist that, under the circumstances, slight evidence would be sufficient to supply the defect and show that in fact the plaintiff's modified order was accepted by the defendants. It is highly probable that when the defendants received the plaintiff's order of October 27, they *intended* to fill it, otherwise they should have notified him and not by their silence left him to infer that the nails would be forwarded, when they had no intention of doing it; and if such an intention would be sufficient to complete the contract, and render it binding on the parties, we might perhaps feel justified in inferring it from the defendant's silence and other facts testified to by plaintiff. But we are not satisfied that such an intention locked up in the breast of a party, and not communicated to the other, is sufficient in any case to constitute such an acceptance of a proposition as to create a binding contract. We think it would not."

This last is certainly the most favorable view possible for the plaintiff, and looking at the case from this standpoint we can conceive of no principle of law that would render the defendant liable.

The defendant's non-liability in this case is not grounded on a mere technicality, but arises out of facts, which are in perfect accord with *right* action in all mercantile transactions. There has been an honest misunderstanding between these merchants, and this has been produced by the fact that the plaintiff, in his

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letter of the fourteenth, *assumed* that it was possible for defendant to fill his order at any time, and *overlooked* the fact that the defendant did not manufacture the machines or carry them in stock; and further that it depended entirely on Osborne & Co., whether the defendant could comply or not.

It may have been that the plaintiff believed that the arrangement, which the defendant had made with the factory, was still open. But if he had given the matter due consideration, his experience as a merchant would have suggested to him that the negotiations between him and the defendant had been unreasonably prolonged, and that it was then optional with the factory, whether it would furnish the defendant the machines, or not. This fact was recognized by the defendant, and it therefore declined in any way to signify an acceptance of the last offer without first ascertaining whether Osborne & Co. were still willing to furnish the machines. As soon as Osborne & Co. positively declined to sell the machines to fill the plaintiff's order, the defendant notified him by telegram.

Nor can it be claimed that the defendant received the purchase money for the machines and that by so doing he assented to the contract; because it is in evidence that the defendant returned the money (Mexican silver) in the original packages.

Our conclusion is that the evidence is insufficient to establish a contract, and that the plaintiff cannot maintain this action. The judgment will be reversed and cause dismissed, and final judgment entered in this court for the defendant. Judge THOMPSON concurs. Judge ROMBAUER is absent.

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Plant Seed Company, Appellant, v. Michel Plant and Seed Company *et al.*, Respondents.

St. Louis Court of Appeals, June 4, 1889.

37 313 | 54 521 | 87 313 | 96 *600

1. **Corporate Name, Injunction for Piracy of.** When a person or business corporation assumes a firm name or corporate name, which so closely resembles that of a business rival that the business of the latter is liable to be diverted, and the public deceived on account of it, the use of such name will be restrained by a court of equity.

2. ———. But to warrant such relief, the facts warranting it must be established by very satisfactory proof.

3. ———. When the conduct complained of is that merely of a fair competitor in the same line of business, and the name assumed is not likely to mislead ordinary purchasers, a court of equity will not interfere.

4. ———. And since the statute requires every business corporation to select a business name indicative of its business, too stringent rules are inadvisable in such controversies, and, when a case is free from actual fraud, the fact, that some confusion and friction in business results from the similarity of names, will not warrant interference.

5. **Practice, Trial:** costs. When, in an equity suit, the substantial issues are found partly for the plaintiff and partly for the defendant, the court has discretion to apportion the costs.

Appeal from the St. Louis City Circuit Court.—Hon. Shepard Barclay, Judge.

Affirmed.

Leonard Wilcox, for the appellant.

Under the evidence it must be declared as a matter of law that defendant's name is an unlawful imitation of plaintiff's name, and its use by defendant is unlawful. *State ex rel. v. McGrath*, 92 Mo. 355; *Sanders v. Utt*, 16 Mo. App. 324; *Glenny v. Smith*, 11 Jur. [N. S.] 964;

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Seed Co. v. Seed Co., 23 Mo. App.579; *Guardian, etc., Co. v. Guardian, etc., Co.*, 43 L. T. [N. S.] 791-3. The corporate name of the defendant company was adopted in violation of an express statute, and its use may be enjoined at the suit of a private party. *State ex rel. v. McGrath*, 92 Mo. 355; R.S. 1879, secs. 926, 957; Pom.'s Eq. Jur., secs. 252, 1347, 1349; *Overall v. Ruenzi*, 67 Mo. 203, 207; *Mathis v. Town of Cameron*, 62 Mo. 504, 506; *Hayden v. Tucker*, 37 Mo. 214; Wood, Nuis. [2 Ed.] p. 904; High, Inj., secs. 897, 901, 907; Kerr, Inj. 475, *et seq.* An injunction will lie at the suit of the person injured, to prevent the use by another of generic terms or other names common to the public, for the fraudulent purpose of diverting his custom. *Seed Co. v. Seed Co.*, 24 Mo. App. 579; *Lee v. Haley*, 5 Ch. App. Cases, 155; *Glenny v. Smith*, 11 Jur. [N. S.] 694; *Boswell v. Mathie*, 11 Sess. Cases [Rettie] 1072; *Matsell v. Flanagan*, 2 Abb. Pr. R. [N. S.] 459; *Churton v. Douglass*, 28 L. J. Ch. 841; *Pierce v. Guitard*, 8 Pac. Rep. 645, 647; *Boulnois v. Peake*, 13 Ch. Div. 513*n*; Browne on Trade-Marks, secs. 34, 522; 3 Pom.'s Eq. Jur., sec. 1354; *Marsh v. Billings*, 7 Cush. 331. A corporation as well as an individual may be enjoined from the use of a name where it appears that it is an unlawful infringement on the name used by or belonging to another, even if such name be its corporate name. *State v. McGrath*, 92 Mo. 355; High, Inj., sec. 5907; *Ex parte Walker*, 1 Tenn. Ch. 101; *Holmes v. Holmes*, 37 Conn. 279; *Rubber Co. v. Mfg. Co.*, 22 Blatch R. 421; Morawetz, Priv. Corp. [2 Ed.] secs. 354, 1064; *Wallace v. Loomis*, 97 U. S. 154; *Ins. Co. v. Needles*, 113 U. S. 580. The court found the issues joined in favor of the plaintiff, and it should have granted it substantial relief against the wrongful action of defendant. This it did not do. *State v. McGrath*, 92 Mo. 355; *Guardian, etc., Co. v. Guardian, etc., Co.*, 43 L. T. [N. S.] 791; *Devlin v. Devlin*, 69 N. Y. 212; *Glenny v. Smith*, 11 Jur. [N. S.] 694; *Lee v. Haley*, 5 Ch. App. Cases, 135.

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There was conclusive evidence of positive fraud on the part of defendant in the use of its name, and much more of legal fraud. *Matsell v. Flanagan*, 2 Abb. Pr. [N. S.] 459; Kerr on Fraud & Mistake, pp. 16, 17, 25, 26, 55; 2 Pom.'s Eq. Jur., secs. 880, 888; *Bank v. Crandall*, 87 Mo. 212; *Craft v. Day*, 7 Beav. 89, 90; *Pierce v. Guitard*, 8 Pac. Rep. 645, 647; *Rogers v. Rogers*, 11 Fed. Rep. 441-42; *Gray v. Pulley Co.*, 16 Fed. Rep. 499. The taxation of one-half the costs against plaintiff was improper and illegal. *Guardian, etc., Co. v. Ins. Co.*, 43 L. T. 791-3; *Hawkins v. Nowland*, 53 Mo. 328; *Dupont v. McLaren*, 61 Mo. 502.

W. E. Fisse, for the respondents.

Two points are made in this case: *First.* That upon the merits of the case the judgment of the court below is erroneous. *Second.* That the action of the court in requiring each party to pay one-half the costs is erroneous. The law applicable to the questions arising under the first branch of the case is so well settled, and has been so many times affirmed in this court, that extended argument to establish these propositions seems altogether unnecessary, if not entirely out of place. Almost all of the authorities now cited by appellant were brought to the attention of the court upon the first appeal. No new points are made in the present argument. The plaintiff must establish positive and actual fraud on the part of the defendant. This it has not done, and the circuit court has so found. The names used are not similar. *State v. McGrath*, 92 Mo. 355; *Glenny v. Smith*, 11 Jur. [N. S.] 964; *Boswell v. Mathie*, 11 Ret. Sess. Cas. 1072; *Sanders v. Utt*, 16 Mo. App. 324; *Lee v. Haley*, 5 L. R. Ch. App. Cas. 135; *Guardian, etc., Co. v. Guardian, etc., Co.*, 43 L. T. [N. S.] 791; Article in 10 Cent. L. J. 461, 481. With respect to that portion of the decree which apportioned the costs between the parties, the plaintiff cannot be

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heard to complain. It is altogether untrue to say that by its judgment the court found all the issues in favor of the plaintiff. Upon the substantial issue in the case the finding was for the defendant. The authority of equity courts to apportion costs between the parties, according to the discretion of the court, had been long recognized prior to the time of the enactment of our statutes concerning costs. And this authority is sustained by *Turner v. Johnson*, 95 Mo. 431.

BIGGS, J., delivered the opinion of the court.

This is not a trade-mark case, but is one of a kindred nature and depends to a great extent for a proper solution on the application of the same equitable principles.

When a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely resembles that of a business rival, previously established, that the business of the latter is liable to be diverted and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed to the detriment of the older company.

But when the conduct of the party complained of is that merely of a fair competitor in the same line of business, and the name assumed is not such as would likely mislead ordinary purchasers in buying, then a court of equity will not interfere. We think we are justified, both upon principle and authority in the assertion, that in a case of this kind a complainant should be required to establish the facts, warranting relief, by very satisfactory proof; because courts are very much disinclined in any way to interfere with, or discourage, competition in trade.

The complainant in this case makes this kind of complaint against the defendant: The "Plant Seed

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Company" and the "Michel Plant and Seed Company" are both business corporations, and have been for many years doing business in the city of St. Louis in the same line of trade.

The original company, of which the plaintiff corporation is the successor in business, was established by the "Plant Brothers" many years ago. In 1872, the firm was incorporated under its present name, and the "Plant Brothers" were, and are now, its principal stockholders. The chief business of the original company, and of the corporation, was, and is now, the sale of garden and grass seeds, in which plaintiff claims a very wide and favorable reputation.

The original company, of which the defendant corporation is the successor in business, was established in 1858 in the city of St. Louis by the "Michel Brothers." The defendant claims that in that year "The Michel Brothers" began to deal in all kinds of flowers, bulbs, plants and garden and grass seeds. The firm originally did business under the firm name of H. Michel & Co., but on the twentieth day of February, 1875, the firm was incorporated by the same name. The defendant corporation continued to do business under this name until July 8, 1882, when an application was made to the secretary of state for a change in defendant's corporate name to that of "Michel Plant and Seed Company," which was granted.

The plaintiff in this action complains of the defendant and says that this change, made in defendant's corporate name, was a scheme of piracy against plaintiff's business, and was concocted by the "Michel Brothers," for this unlawful purpose; that the "Michels" selected the word "Plant" as a part of their corporate name for the fraudulent purpose of deceiving the public and thereby diverting trade belonging to plaintiff.

But the plaintiff alleges that if the purpose of the change was not actually fraudulent, yet the change in the defendant's corporate name made it resemble that of

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the plaintiff so closely, that it was likely to, and did, deceive the public, and mislead plaintiff's customers in making purchases; that many of the plaintiff's customers purchased seeds from the defendant, believing that they were trading with the plaintiff, and that this deception was produced by the similarity of defendant's corporate name to that of the plaintiff; that, in 1884, the defendant moved its place of business to a store room in close proximity to the place where plaintiff was, and had been, doing business for many years; and that this change was made for the purpose of facilitating the defendant's piratical scheme.

The plaintiff also claimed that this similarity in names, on account of defendant's pamphlets, circulars and advertisements, produced great confusion in the plaintiff's business, and especially as to mail and express matter, and greatly to its damage.

The plaintiff asked that the defendant be restrained from using in the prosecution of its business: *First.* Its corporate name. *Second.* The word "Plant" as a part of the corporate name. *Third.* The words "Plant & Seed," as now used by the defendant with a character to indicate the word "and" without having the word "and" printed in full with letters of the same character, size and appearance, as the other words composing the corporate name.

The defendant denied that the change in its corporate name was made for any such intention or purpose as alleged by plaintiff, but it averred that the change was made in compliance with section 763, Revised Statutes, 1879, and that the words "Plant & Seed" were embodied in its corporate name as indicative of its line of business, and that this was done by reason of the requirements of said section; that the "Michel Brothers," who constituted the stockholders of the defendant corporation, had been engaged in selling plants and seeds since 1858, and had a right to use both words in selecting a corporate name. And the defendant denied that,

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because some of the defendant's stockholders bore the name of "Plant," the plaintiff thereby had the exclusive right to use this word. The defendant also denied that there was such a close resemblance between its corporate name and that of the plaintiff, that ordinarily prudent persons were likely to be misled in making purchases on account of it. The defendant also denied that any persons had been so deceived. It also denied that it had moved its place of business near to or in the vicinity of the plaintiff's store for the purpose of injuring the plaintiff in its business, but on the contrary, it averred that the change in its business location was made, because the new location was the best in the city for its business.

The trial court in its decree refused the plaintiff relief, except that it required the defendant, in making use of its corporate name, to have the word "and" printed or written in full and without any abbreviation, and in letters as large as any other letters used in the corporate name. The court by its decree provided that each party should pay one-half the costs.

The plaintiff filed motions for rehearing, and to retax costs, which were by the court overruled, to which ruling of the court the plaintiff excepted, and it has brought the case to this court, and asks us to review and reverse the decree of the circuit court.

The plaintiff complains of the judgment of the circuit court: *First.* Because the court failed to grant plaintiff all the relief to which it was entitled under the evidence. *Second.* Because the court found the issues for the plaintiff, and, having done so, it had no right to tax any portion of the costs against the plaintiff.

This case was before this court once before, and is reported in 23 Mo. App. 579. The circuit court had sustained a demurrer to the petition, and this court, in passing on the case, in effect decided that the plaintiff could not acquire the exclusive right to use the word "Plant" in its corporate name, and that there was not

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such a resemblance or similarity between the names of the two corporations, as to authorize a court of equity in holding that the adoption of this name by the defendant was, in itself, an unlawful act; but, as the plaintiff alleged that the name was adopted by the defendant with the fraudulent intent of appropriating the plaintiff's trade, and that, on account of this change and the fraudulent efforts and acts of the defendant, the public was deceived, and the plaintiff's trade diverted, it could not be said that the adoption of the name by the defendant was a lawful act. This court in discussing this question said: "But an act, done with a fraudulent motive and inflicting damage upon another, is never a lawful act, because it has long been established in our jurisprudence that the concurrence of fraud and damage in such cases causes an injury, which gives rise to a cause of action."

We have no disposition to in any way modify our former opinion as to the law governing this cause. The word "Plant" is one of very common use, and may very properly be used to designate a business, and the fact, that the "Plant family" were the founders of the plaintiff's business and its principal stockholders, affords no reason why the defendant could not use the word to designate its business, provided it was done for an honest purpose; and, with the same proviso, the defendant had the right to adopt its present corporate name. We do not think that the resemblance between the two corporate names is sufficiently close, to raise a probability of mistake on the part of the public, or to show a design or intention on the part of the defendant to deceive. *McCortney v. Gomhort*, 45 Mo. 593.

In recent years, the great bulk of the commercial business of our state has been conducted by business corporations, and, prior to 1885, our statute required that each corporation should select a corporate name indicative of its business. Under such circumstances, the choice of names by which a new company can designate

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its business, so as to satisfy the requirements of law and at the same time avoid trouble with the older companies, is very limited, and it would not be wise for the courts to adopt too stringent rules in determining controversies like the one under consideration. If such a case is free from actual fraud, it is better for the courts to permit some confusion and friction in business, than to hamper and discourage trade by judicial interference.

The evidence in this case is very voluminous and it is impossible for us to discuss it in detail in this opinion. The defendant's evidence tended to show that the "Michel Brothers" had been engaged in the "plant and seed" business for many years, under the firm name of H. Michel & Co.; that they incorporated their firm in 1875 and adopted the firm name as their corporate name; that, subsequently, section 763 of the Revised Statutes was enacted, and rendered it necessary for the defendant to change its corporate name, and required the defendant to adopt a new name which would describe or indicate its business; and that, as its business was the sale of all kinds of plants and seeds, the defendant selected or adopted its present corporate name. This evidence satisfies us that in making the change, the "Michel Brothers" had no intention of appropriating or diverting the plaintiff's trade.

But the plaintiff urges several reasons why the evidence in the case does show a preconceived fraudulent purpose by the defendant's stockholders in assuming its present corporate name; that, when the present name was first mentioned, Ernst Michel suggested that the plaintiff might object to the use of the word "plant," and that this showed a consciousness on the part of the defendant's stockholders that the selection of the name made by the defendant would prove detrimental to the plaintiff's business.

We cannot adopt this view. This circumstance rather impresses us with the idea that Ernst Michel

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supposed that the plaintiff had the legal right to object to the use of the word "plant" by any other corporation, for the very reason afterwards and now urged by it, *i. e.*, that the word was the name of its founders and principal stockholders, and that the use of the word was, *ipso facto*, an infringement of its legal rights.

The plaintiff also insists that the location of the defendant's seed store, in 1884, in close proximity to the plaintiff's place of business, of itself shows that "the Michels" had determined on a "piratical policy" in the outstart, and that they changed the defendant's place of business to enable them to more successfully mislead the public, and secure the plaintiff's customers.

We cannot agree with the plaintiff in this conclusion. The evidence clearly shows that the defendant's place of business on Olive street, prior to 1884, was not a favorable locality for the retail seed trade, and that the portion of the city in the vicinity of the plaintiff's place of business was the best for the sale of garden and grass seeds, because the farmers of Illinois and St. Louis county generally congregated there for the purpose of disposing of their products. This affords a good and sufficient reason for the removal of the defendant's seed store to its present location. That this change produced a falling off in the plaintiff's retail or counter trade, as shown by its testimony, is quite probable, but that was, we think, the result of competition in trade, which the plaintiff must expect to encounter in this busy and pushing business world.

The plaintiff's evidence tended to show that, in 1886 and 1887, one Chapman, a clerk in the defendant's seed store, represented to several of the plaintiff's customers that the defendant's store was the plaintiff's place of business, and that Chapman, by such fraudulent representations, succeeded in selling goods to several of the plaintiff's customers; and plaintiff claims that this furnishes some evidence of an original fraudulent purpose. Chapman denied making any such representations. But, assuming this to be true, it does not

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and ought not to have the probative force or effect claimed by the plaintiff, unless the defendant authorized, or had knowledge of the fraudulent conduct of its salesman, or afterwards ratified it. There is no proof that Chapman made any such fraudulent representations with the knowledge or consent of the defendant.

It is urged that it must be held that defendant ratified the acts of Chapman by retaining him in its employ, after the depositions of the plaintiff's witnesses, establishing the fact, had been taken. This position is untenable, because Chapman flatly denied that he had made these representations, and the defendant had the right to believe him in preferenee to the plaintiff's witnesses.

If it be true that Chapman did make the false representations claimed by the plaintiff, this might afford the basis of an action for damages, but it could not be regarded as a reason why a court of equity should enjoin the defendant in the use of its corporate name. *Alden v. Gross*, 25 Mo. 132.

There was evidence of confusion in the delivery of mail matter and mistakes in the sending of orders, which, in the opinion of the trial court, might have resulted from the careless use of the script sign "&" in the defendant's printed catalogues, and other advertisements. And, in the opinion of the court, these difficulties could, in a great measure, be obviated by requiring defendant, in the use of its corporate name, to have the word "and" printed in letters of equal size with those used in the other words of the corporate name. To this extent it may be that the plaintiff was entitled to relief.

It is urged that the plaintiff's evidence shows that the plaintiff's business was diverted, and the public deceived, by the similarity of the plaintiff's and the defendant's corporate names, and that, as facts are stronger than theories, the plaintiff is entitled to the relief asked. The evidence in the case shows this to

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some extent, but we think this resulted from want of ordinary care and observations on the part of the plaintiff's customers, or from the careless use, by the defendant, of the script sign "&" in its painted signs, catalogues and advertisements, as found by the trial court.

It seems that the defendant was satisfied with the decree as rendered, and, as appears from the brief of its counsel, has conformed its business to the requirements of the decree.

It has only been possible for us in this opinion to notice the stronger points relied on by the plaintiff for a reversal, but the entire record has received our attention, and we have been unable to give our consent to the plaintiff's theory of the case, which has been so ably presented by its counsel.

The court divided the costs between the parties, and the plaintiff insists that the court had no right to do this, and that the decree should be so modified as to adjudge all the costs against the defendant.

The question of the power of trial courts to apportion the costs in an equity case has been fully discussed in the recent case of *Turner v. Johnson*, 95 Mo. 453. In this case the supreme court held that when "substantial issues are found for one party and like issues found for the other, the taxation of costs will rest in the discretion of the court, and will not be disturbed unless there has been a clear abuse of that discretion. This discretion is vested in the court when the verdict is for one party on one count or defense, and for the other party on another count or defense, and there is no reason why the principle should not be applied in equity suits, though there be but one count, there being distinct issues. R. S., sec. 1002.

In the case under consideration, there were several issues, and while the decree recites the fact in a formal way, that the issues were found for plaintiff, yet it is quite evident, from the *relief* granted, that the *material*

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issues in the case were found for the defendant. The evidence in the case tended to prove that the careless use of the script sign "&" in the defendant's corporate name might have produced some of the confusion in the plaintiff's business, and might have had a tendency to mislead transient customers, and, for the purpose of obviating this, the plaintiff was granted relief. As to the main issues in the case, to-wit: The "*fraudulent intention*" of the defendant in making the change in its name, the court certainly found for the defendant.

We are of the opinion, that the adjustment of the costs as made by the trial court was equitable, and we are not inclined to modify the decree in that respect. The judgment will be affirmed. Judge THOMPSON concurs. Judge ROMBAUER concurs in the result.

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STATE OF MISSOURI *ex rel.* ROBERT F. SANDERS, Relator, v. JOHN G. WEAR, Judge of the Twenty-third Judicial Circuit of Missouri, Respondent.

St. Louis Court of Appeals, June 27, 1889.

1. **Mandamus, Right to.** *Mandamus* will lie against a circuit judge to require him to take bond from one, who was appointed clerk of his court on the resignation of the incumbent of the office, and commissioned as such by the governor of the state; and this is so notwithstanding that the clerk who resigned was suspended from office by the judge, and that the judge had appointed a temporary clerk prior to the appointment by the governor, and that the validity of the appointment by the governor was contested on this ground.

2. ———. *Mandamus* lies in such case not for the determination of the validity of the governor's appointment, and the right of the appointee to the office, but for the purpose of enabling the appointee to qualify, and then enforce his title, if denied.

Original petition for mandamus.

WRIT ORDERED.

Hough, Overall & Judson, for the relator.

The respondent shows the highest evidence of right and title, *i. e.*, his commission from the governor of the

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state. This commission, it is true, is not conclusive evidence of his right to the office, as that right may be contested in a *quo warranto* proceeding by another claimant or by the state. But for the purposes of this proceeding, to-wit: Requiring the respondent to do the duty which the law enjoins, it is conclusive. The contention of respondent is answered by *Beck v. Jackson*, 43 Mo. 118. The decision in the *Jackson case* also answers the argument that relator has a complete remedy by *quo warranto*. In *quo warranto*, at the relation of the state or attorney general, only, the right of the incumbent can be inquired into. *State v. Vail*, 53 Mo. 97. And the relator in this case, having the governor's commission, has the right to qualify for the office so that he can assert his own title by proceeding against the incumbent.

W. H. Clopton, for the respondent.

(1) This court will not issue a peremptory writ of *mandamus* unless the relator shows that he has a good title, or a perfect right to the remedy he demands. *State v. Albin*, 44 Mo. 346; *State v. Newman*, 91 Mo. 451; High Ex. L. R. [2 Ed.] sec. 10; *People v. Board*, 64 N. Y. 600; *Plowman v. Thornton*, 52 Ala. 559. The petitioner does not show that he is entitled to the office. Bragg could not resign pending his suspension and while the charges against him remain undisposed of. A suspended clerk cannot resign his office because he is not in possession of it. *Miller v. Board*, 25 Cal. 93. A resignation after charges and suspension would defeat the law imposing a penalty of one thousand dollars to use of the county on conviction as provided by section 635, Revised Statutes. (2) There was no vacancy in the office when the governor appointed the relator. And it is only to fill vacancies that the constitution and law give him the power to appoint. *State v. Lusk*, 18 Mo. 333, 337; *State v. McGrath*, 64 Mo. 141;

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State v. Boeckler, 56 Mo. 21; *State v. Boone Co.*, 50 Mo. 324; *Walsh v. Commonwealth*, 89 Penn. St. 419; *Harrison v. Simmons*, 44 Conn. 319. The regular clerk has not resumed his office, nor has a clerk been elected; therefore the incumbent is legally entitled to the office, and the governor had no power to make the appointment. The commission of the governor is not, even if *prima facie*, title to the office. *Plowman v. Thornton*, 52 Ala. 559, 569; *State v. Neely*, 24 La. Ann. 19; *State v. Towne*, 21 *Ib.* 400. (3) Petitioner has a full, complete and adequate remedy by *quo warranto*. R. S. Mo., p. 645. Even without having his bond approved the relator may file an information in the nature of *quo warranto*, and have the question of title to the office tried. *State ex rel. v. Vail*, 53 Mo. 97. If the relator can avail himself of the statutory remedy of *quo warranto* he is not entitled to the writ. *State v. Lubke*, 15 Mo. App. 152; *State v. Marshall*, 82 Mo. 484; *State v. Horner*, 16 Mo. App. 191; *Mansfield v. Fuller*, 50 Mo. 339; Moses on Man., p. 62; High on Ex. L. R. [2 Ed.] secs. 15–16. A peremptory writ would place the relator in no better position than he now occupies. And the writ is never issued.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding by *mandamus* against the judge of the twenty-third judicial district of Missouri, to compel him to fix the amount of the petitioner's bond for the office of clerk of the circuit court of Dunklin county and *ex officio* recorder of said county, and to examine the sureties presented by the petitioner, and, if the sureties are found qualified, to approve said bond.

The alternative writ, which is a mere transcript of the petition, sets up the following facts: That William G. Bragg, Jr., was duly elected and commissioned, and qualified as clerk of the circuit court of Dunklin county for a period of four years from the first day of January, 1887, and that he entered into the duties of his office as

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such. That he was, on the sixth day of December, 1888, suspended from said office by the respondent, acting as judge of said court, on three several charges which need not be set out; and that the respondent appointed J. B. Blakemore to act as temporary clerk in his place, who is now discharging the duties of the office. That, on the seventh day of January, 1889, three separate informations were filed in the office of the circuit clerk of Dunklin county against the said Bragg by the prosecuting attorney of Dunklin county, for the three several offenses for which he was suspended, and that the same have ever since been and are now pending in said county. That on the twenty-second day of January, 1889. the said William G. Bragg, Jr., tendered his resignation of the office of clerk of the circuit court of Dunklin county to the governor of the state, who, on the same day, accepted the same and appointed the petitioner herein to be clerk of said circuit court to fill the vacancy occasioned by the said resignation, and who thereupon, on the same day, issued and delivered to the petitioner a commission in due and proper form for said office. That thereafter the petitioner took and subscribed his oath of office in due form of law, which oath of office was duly endorsed on his commission; and that his commission and oath of office have been shown to this court. That thereafter on the fifteenth day of May, 1889, during the vacation of said circuit court of Dunklin county, the petitioner applied in chambers to the respondent, judge of said court, and exhibited to him his commission as clerk of said court with the oath of office endorsed thereon, and applied to him to fix the amount of bond to be given by the petitioner as said clerk and *ex officio* recorder; but that the respondent then and there refused to fix the amount of such bond, stating that he declined to do so because of the pendency of the charges against the said Bragg, and that he would not fix the amount of said bond while said charges were undisposed of. That, on the same day, the petitioner

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applied to the respondent and submitted to him his two bonds for circuit clerk of Dunklin county and *ex officio* recorder of said county,—his bond as circuit clerk being in the sum of twelve thousand dollars, and his bond as recorder being in the sum of six thousand dollars, which said bonds have been presented and shown to this court. That said sums, so fixed as the penalty of each of said bonds, were far more than sufficient to cover any possible defalcation in said offices, and that each of said amounts was more than three times the amount given, or required to be given by any predecessor, or any prior incumbent in said offices. That each of said bonds constituted a good and sufficient bond, as provided by law for said office of circuit clerk and recorder respectively; but that the respondent did nevertheless arbitrarily refuse to approve said bonds with the penalties in said amounts, although not denying said bonds to be good and sufficient bonds as required by law,—basing his refusal solely upon the reasons aforesaid. That, at the time of the presentation of these bonds, the petitioner brought to the respondent in chambers, as aforesaid, the sureties whose names were signed to said bonds, and offered them to him for examination, as to their qualifications as said sureties. That said sureties were then and there able to justify, each of them, in an amount of taxable property subject to execution over and above all liabilities, far in excess of the amount of the penalties of said bonds; but that the respondent nevertheless arbitrarily refused to examine such sureties as to their qualifications, or to approve said bonds, or to pass upon them in any form, but did not deny such bonds to be good and sufficient bonds as required by law, but based his refusal solely upon the reasons aforesaid. Finally, the alternative writ recites that, notwithstanding the appointment and commission of the petitioner as aforesaid and the sufficiency of his said bonds and the sureties thereon, the respondent arbitrarily refused, and still refuses, either to fix the amount

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of said bonds, or to approve the same, or to examine the sureties as to their qualifications therefor, or to recognize the commission of the petitioner in any manner, or his title to his office thereunder.

A proceeding of the same nature and between the same parties was before us at the present term, numbered 4400. In that proceeding the respondent made a return, a portion of which the relator moved to strike out, which motion to strike out was sustained by this court, all the judges being present and concurring. The portion of the return thus stricken out was as follows: "Respondent denies that the said William G. Bragg, Jr., could, during the time of his suspension in office as clerk of the circuit court of Dunklin county, and while the charges aforesaid were pending against him in the circuit court of said county and undetermined, and before he had been restored to his said office, by resignation, create such a vacancy as would entitle the relator, the said Robert F. Sanders, to the right of becoming the clerk of said circuit court of Dunklin county, and of entering upon the duties of said office. Respondent denies that relator has any interest in the office of clerk of the circuit court of Dunklin county, except such interest as is contingent upon and can arise only after the charges now pending against the said William G. Bragg, Jr., in the circuit court of said Dunklin county, as hereinbefore set forth, are determined, and said Bragg adjudged not guilty thereof, or that he be otherwise discharged therefrom."

After we awarded the motion to strike out this portion of the return in the former case, the respondent set up that the bond had been tendered to him by the relator on Sunday, and, as a judge cannot be required to examine into the sufficiency of an official bond which is tendered to him on Sunday, the relator dismissed his proceeding and thereafter brought the present proceeding. The respondent, appearing by different counsel from those who represented him in the former proceeding,

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now files a motion to quash the alternative writ, on the following grounds: (1) Because it appears from the terms of the said alternative writ that the relator has no right to the office of clerk of the circuit court of Dunklin county. (2) Because it appears from the terms of said alternative writ that there was no vacancy in the office of clerk of said Dunklin county circuit court on the twenty-second day of January, and that therefore the governor of the state had no power, under the constitution and laws of the state of Missouri, to appoint the relator clerk of said court. (3) Because it appears from the terms of said alternative writ that William G. Bragg, Jr., was suspended by respondent for misdemeanors in office, and that J. B. Blakemore was by respondent appointed a temporary clerk, and that said J. B. Blakemore had taken the oath, given bond, and was performing the duties of clerk of said court on said twenty-second day of January, 1889, and when said alternative writ was issued. (4) Because said relator, if he is entitled to the office of clerk of the circuit court of Dunklin county by virtue of the alleged appointment, has a full, complete and adequate remedy by *quo warranto*. (5) Because a peremptory writ of *mandamus* would place relator in no better position than he now occupies, and would subserve no useful purpose.

It appears from the recitals of the alternative writ, and from the motion to quash the same, that the grounds of the motion may be reduced to three: *First.* That the petitioner is not entitled to the office of clerk of the circuit court of Dunklin county by virtue of his commission. *Second.* That if he is entitled to the office he has a full, and adequate remedy to recover possession of it by *quo warranto*. *Third.* That a peremptory writ of *mandamus* would place him in no better pesition than that which he now occupies, and would subserve no useful purpose.

We understand both parties to concede that the title of the petitioner to the office cannot be tried in a

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proceeding by *mandamus* against the judge, but that it can only be tried in a proceeding in the nature of a *quo warranto* against the incumbent of the office. And yet the weakness of the respondent's argument consists in this,—that, while we cannot try the title to the office in this proceeding, we ought to decide against the right of the petitioner to the office; that is to say, having no jurisdiction to try the question, we nevertheless ought to decide it in favor of the position which the respondent has taken. If the object of this proceeding were to compel the respondent to induct the relator into the office, the position would be well taken that he has mistaken his remedy. But such is not the proceeding. The command of the alternative writ is that the respondent shall examine into the sufficiency of the bonds, which the relator tenders to him for that purpose, and into the sufficiency of the sureties thereon, and if the bonds and sureties are found sufficient, that the respondent approve the same. On the part of the respondent able arguments have been made in favor of the view taken by respondent that the relator has shown no title to the office. We do not intend to consider that question at all, because the title of the relator to the office is not directly involved in this proceeding and could not be determined in it. The respondent has undertaken to decide it *ex parte* against the right of the petitioner, but we will not undertake to decide it either way in a proceeding by *mandamus* against the respondent.

The recitals in the alternative writ show that the respondent has taken the position that the commission of the relator is void for the reason that Mr. Bragg, the regular incumbent of the office, could not resign while charges against him were pending, and that the commission issued by the governor to the relator was therefore void. We decided in the former proceeding between these parties (No. 4400 of this court) on the motion, above recited, to strike out parts of the return, that this was not a good defense to this proceeding. The

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cause should have rested upon that decision, and the relator should not have been put to the trouble and expense of bringing another proceeding invoking from us a second decision of the same question. We shall adhere to our former decision, especially as it was made by a full court and after full consideration. But, as no opinion was written in that case, it not being necessarily a final disposition of the controversy as it then stood, we shall now state some of the reasons which lead us to that conclusion, and which now lead us to the conclusion that this motion to quash the alternative writ is not well taken.

The question is governed by the decision of the supreme court in *Beck v. Jackson*, 43 Mo. 117, a decision which, so far as we have been able to find, has never been overruled or questioned in any subsequent case. In that case the relator had been duly commissioned and appointed by the governor of the state, under a provision of the constitution, to the office of circuit clerk and *ex officio* recorder of Cape Girardeau county, to fill a vacancy caused by the death of the previous incumbent; and the judge of the court refused to receive his bonds as clerk and recorder for the reason that he had appointed another person to hold the office and had approved his bonds and had put him in possession of the office, which reasons the judge endorsed on the bonds. The court held that the relator was entitled to a *mandamus* to compel the judge to approve the bonds. In giving the opinion of the court, WAGNER, J., said: "It is now contended by the respondent that the relator has no standing in the court; that, before he can invoke the writ of *mandamus*, he must establish his right to the office at law. But this is not a proceeding asking to be inducted into the office; it is merely a demand that the respondent shall proceed to perform a duty devolved upon him by law; and, for a refusal or neglect to perform, the relator is remediless, unless the court issues the writ. The commission issued by the governor was at

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least *prima facie* evidence of title to the office, and, if its validity or legality should be disputed, that question can only be determined by a proceeding in the nature of a *quo warranto*, in case Harrison (the clerk appointed by the judge) refuses to surrender the office." No sound distinction can be taken between that case and the case before us. We might stop here; but the zeal and learning, with which the view of the respondent has been pressed upon us, justify us in making some further observations.

It is said by a modern writer of reputation, speaking of the writ of *mandamus*: "Cases may, therefore, arise where the applicant for relief has an undoubted legal right for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise, judicial discretion, still refuse relief. Thus where, by granting the writ, the court would in effect decide questions of grave importance concerning the official *status* of parties not before the court, and who have had no opportunity of being heard, it may very properly refuse a *mandamus*, although the case presented is in other respects a proper one for the exercise of the jurisdiction." High's Extraordinary Legal Remedies, section 9. We understand counsel for the respondent to rest their objection to the granting of the relief sought for in this case partly upon the view of the law embodied in the above quotation. We do not question this view of the law at all. But here no such circumstances would attend our decision. We should not, by awarding a peremptory writ, decide the right of the relator to the office as against the present incumbent, but, under the authority of *Beck v. Jackson*, *supra*, we should merely do what he is entitled to have done in order to put him at the threshold of a contest for the right to hold the office.

Another position pressed upon us in the arguments which have been submitted in behalf of the respondent proceeds upon another passage in the same work:

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"The relator must not only show a clear legal right to have the particular thing in question done, but also the right to have it done by the persons against whom the relief is sought." High's Extraordinary Legal Remedies, section 10. This is an elementary principle in the law of *mandamus*, and we do not question it at all. But, in our opinion, the relator shows such a right. The argument against this conclusion misses the mark in this: That it is all to the effect that the relator must show a right *to the office* in order that we should require the judge to approve his bonds if sufficient. This, as we have already said, would be the case if he were seeking to have us command the judge to induct him into the office. But he is not seeking any such relief. He is seeking to have us command the judge to approve his bond, and the only question which it is necessary for us to consider is, whether he shows a right to have his bonds approved, if sufficient. That he shows such a right when he exhibits the governor's commission to the office is shown by *Beck v. Jackson*, *supra*, to which we must again recur for an answer to this argument.

The same writer makes the following observation: "It is worthy of note that proceedings in *mandamus* do not always or necessarily determine the question of ultimate right involved, and the writ is frequently granted when it can only determine *one step* in the progress of inquiry, and when it cannot finally settle or determine the controversy." High's Extraordinary Legal Remedies, section 11. This is in conformity with the following view expressed in a case in the court of appeals of New York: "When the act, the doing of which is sought to be compelled by *mandamus*, is the final thing, and, if done, gives to the relator all that he seeks proximately or ultimately, then the question, whether he is entitled to have that act done, may be inquired into by the officer or person to whom the *mandamus* is sought, and is also to be considered by the

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tribunal which is moved to grant the *mandamus;* but where the act to be done is *but a step* towards the final result, and is but the means of setting in motion a tribunal which is to decide upon the right to the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to that final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it." *People ex rel. v. Canal Appraisers*, 73 N. Y. 446. This language is quite applicable to the case before us. The regular incumbent of the office has resigned his commission, and the governor of the state has commissioned the relator to hold the office until the next general election. The commission of the governor is under the circumstances *prima facie* evidence of the title of the relator to the office, and is full evidence of his right to have his bonds approved if sufficient, in order that he may be in a position to demand the possession of the office and to contest his right to the possession of it, if it is refused by the present incumbent.

This consideration also disposes of the argument that the remedy of the relator, if he has any, is by a proceeding in the nature of a *quo warranto*. This, we must repeat, would be true, if he were seeking in this proceeding to be inducted into the office. And this is in accordance with a view laid down by Mr. High, of the soundness of which we have no doubt, that the existing legal remedy which bars interference by *mandamus* must be "appropriate to the particular circumstances of the case; that is, it must be such a remedy as affords relief upon the very subject-matter of the controversy, and, if it is not adequate to afford the party aggrieved the particular right which the law accords him, *mandamus* will lie, notwithstanding the existence of such other remedy." High's Extraordinary Legal Remedies, section 17. What other relief, we may ask, can the relator have to procure *the approval of his bond* and thus place him

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in a position where he can contest his right to the office with the real party entitled to be the defendant in such a contest? Can he proceed to have his bond approved by a proceeding in the nature of *quo warranto?* And if he proceeds by *quo warranto* against the present incumbent of the office without the approval of his bond, will he not be met with the answer, "You are not a qualified person, you have not given bond as required by the statutes?" Whether such an answer under such circumstances would be good—whether he would not have such an interest in the subject-matter of the office as would entitle him to institute the proceedings with the concurrence of the prosecuting attorney of the county or of the attorney general of the state, by virtue of his commission alone, especially in view of the fact that the primary question in such a case is whether the incumbent properly holds the office,—we do not undertake to determine in advance. It is enough for us to see that it is entirely seemly and proper for him to qualify by giving the required bonds before instituting such a proceeding, and that his failure so to qualify beforehand might place obstacles in his way, or prejudice him in the prosecution of such a proceeding.

So much of the motion to quash and of the arguments adduced in support of it, as proceed upon the ground that this *mandamus*, if granted, will be a useless proceeding, placing the relator in no better position than he now occupies, is shown to be untenable by *Beck v. Jackson*, already cited. This argument might be good if this were a case where the relator had not even a *prima facie* right to the office, as where he should present himself without any commission at all. But we have said that the commission of the governor, under the circumstances of the case, gives him a *prima facie* right to the office, and whether it is a sufficient right we do not undertake to decide in this proceeding, for this is not the appropriate proceeding in which to

decide the question; nor should the respondent have undertaken to decide it *ex parte* by refusing to approve the relator's bond.

The motion to quash the alternative writ is overruled, and a peremptory writ will issue.

Judge Biggs concurs. Judge Rombauer is absent.

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STATE OF MISSOURI, at the relation of WILLIAM CAMPBELL *et al.* v. THEODORE HEEGE, Presiding Judge, AND PHILIP DEUSER AND T. F. ACKERMAN, Associate Judges of the County Court of St. Louis County.

St. Louis Court of Appeals, July 6, 1889.

1. **Action, Tax payers' right of.** After refusal by the attorney general of the state and of the prosecuting attorney of the county to act, a writ of *certiorari* may be granted upon application of assessed tax-paying citizens of the township to revise the illegal action of the county court in granting a license to keep a dramshop in such township.

2. **Downing Law, Action of County Court Under.** The county court in issuing such dramshop license acts judicially and not ministerially.

3. ———. An application in writing for a license, signed by tax payers and verified by the applicant and stating the place where the dramshop is to be kept, although not in form the petition of the applicant, is a substantial compliance with the requirement of Revised Statutes. section 5438, as amended by the Downing law (act of March 24, 1883).

4. **Downing Law, Jurisdiction of County Courts Under.** The jurisdiction of the county court in granting a license must appear on the face of its proceedings.

5 ———. It is therefore essential that the petition should show that it is signed by the requisite majority of *assessed* tax-paying *citizens*; a petition which merely purports to be signed by a majority of tax payers of the township is insufficient.

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6. ——. **The requirement, that the petition should be laid before the county court at the first term after the filing of it in the office of the clerk, is mandatory.**

7. ——. **The county court may amend, revise or revoke its order granting a license during the term in which the order was made.**

James P. Dawson and *Zack. J. Mitchell*, for the relators.

The statute (Session Acts, 1883, sec. 4. p. 87) provides that the petition therein required shall be filed in the office of the clerk of the county court, and by said clerk laid before the court at the first term thereafter. The same section provides that "all dramshop licenses issued contrary to the provisions of this section shall be void." The county court construed this statute to permit the granting of a license at the same term and on the same day the petition was filed. The question thus determined by them was a judicial question. *State ex rel. v. Burckhartt*, 87 Mo. 537. This construction by the county court was clearly erroneous, and its action was void. The affidavit of the applicant for license was no competent evidence of the sufficiency of the petition. The statute necessarily imposes upon the court the duty of investigating and determining by competent proof whether the petition presented complies with its requirements. And if it undertakes to determine this question arbitrarily and without any competent evidence its action is illegal, and will be reversed on *certiorari*. *People v. Board of Police*, 72 N. Y. 415, 445; s. c., 39 N. Y. 506; *People v. Smith*, 45 N. Y. 777; *People v. Weygant*, 14 Hun. 546; *Williams v. People*, 24 N. Y. 399; *Berry v. Lowe*, 10 Mich. 9; *Hyde v. Nelson*, *Ib.* 357; *State v. Police Comms.*, 14 Mo. App. 308.

John R. Warfield, for the respondents.

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THOMPSON, J., delivered the opinion of the court.

This is a *certiorari* sued out in this court to remove to this court the record of the county court of St. Louis county in relation to the granting of a dramshop license to Henry Horch.

The respondents under the seal of their court have made a return of the record and proceedings in the matter referred to, as fully as it remains among the records, papers and files of their court. They further return that it is a fact, as stated in the relator's petition, that a petition was presented to the respondents as such county court justices by the said Henry Horch on or about the —— day of June, 1889—purporting to be signed by a large number of the assessed tax-paying citizens of Central township, asking for the granting of a license to keep a dramshop in the town of Webster Groves in said township; "but as to whether the said petition was first filed with the clerk of said county court on the same or on a different day, or at the same or on a prior term from that on which the same was presented to or acted upon by the respondents as aforesaid, respondents have no knowledge other than as may be disclosed by the files and records of their said court. The respondents deny that they acted upon the said petition upon the affidavit of the said Horch alone, or without examination or knowledge of the character or sufficiency of said petition, as alleged, and aver the fact to be that they acted upon the said petition only upon due examination and investigation, and after, as they thought, being fully advised in reference to the same; and that, being of the opinion that said petition was in proper form, and that it contained the names of a majority of the assessed tax-paying citizens of the township, they then, and not till then, granted said petition, and ordered that said license issue upon the said Horch complying with the further requirements of the law.

The respondents have transmitted to this court the

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original of the petition on which the dramshop license was granted. This petition is drawn on a number of printed blanks with the same heading. The caption and and prayer of the petition are as follows: "*Petition for Dramshop License.* To the Hon. County Court of St. Louis County: The undersigned, tax payers of Central township, St. Louis county, petition the court to grant Henry Horch a license to keep a dramshop at Webster Groves in said township for twelve months." To this petition six hundred and sixty names are signed, mostly in pencil, many of which are illegible, and many of which appear to be in the same handwriting.

On the back of this petition is an affidavit of the applicant for the license, which appears to have been made by filling up a blank form, and which is as follows:

"State of Missouri,
County of St. Louis. }

"Henry Horch, being duly sworn, on his oath says that the foregoing petitioners comprise a majority of the tax payers of —— in Central township of St. Louis county.

"(Signed), HENRY HORCH."

"Sworn to and subscribed before me this third day of June, 1889.

"(Signed), W. C. WENGLER,
"County Clerk."

On the back of this petition is the following endorsement: "June 3, 1889. Ordered license to be granted on compliance with the law."

"THEO. HEEGE,
"Pres. Justice."

The respondents have also returned to this court a certified copy of the order of their record granting said dramshop license. It is as follows:

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"State of Missouri, }
"County of St. Louis. } ss. May Term, 1889.

"In the county court of said county, on the third day of June, 1889, the following among other proceedings were had, viz.:

"Now come tax payers of Central township and petition the court to grant Henry Horch a license to keep a dramshop at his stand in Webster Groves for six months from the third day of June, 1889. Ordered that the license be granted upon compliance with the law. Ordered that the dramshop bond of Henry Horch, in the sum of two thousand dollars, be and the same is hereby approved.

"And thereafter, on Monday the tenth day of June, 1889, the following further proceedings in said matter were had, to-wit: Minutes of last meeting read and approved, except that portion in relation to Henry Horch's dramshop petition, and it is ordered that the approval of said petition be continued until Monday June 17, 1889, for further hearing.

"And thereafter, on Monday, the seventeenth day of June, 1889, the following further proceedings were had in said matter: In the matter of Henry Horch's dramshop petition,—it now appears to the court that, on the third day of June, 1889, a dramshop license was issued and granted to him by order of the court, and the same is therefore approved."

The bond, with the approval of the presiding justice endorsed thereon, is also returned to this court with the other papers.

On the seventeenth day of June, 1889, a large number of "assessed tax-paying citizens" of Central township filed a remonstrance against the proceeding which had been taken by the county court in issuing the said dramshop license. This remonstrance was predicated upon the following grounds:

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"1. The court, as we are informed and believe, was without authority in law to consider said petition, as filed on the third day of June, 1889, and is still without authority to affirmatively consider such petition.

"2. That said petition is not in law such as the court can lawfully affirm, in that it does not contain a majority of the assessed tax-paying citizens of said Central township, and, if granted, would be null and void.

"3. That the confidence of the court has been imposed upon by said petitioners falsely representing such petition as containing a majority of the assessed tax-paying citizens of said Central township: whereas it does not contain such majority, and the court has been thereby induced to consider the granting thereof, which, if effected, would be contrary to law, and subject the judges thereof to the penalties under the law incident to their so doing.

"4. That the granting of said petition would be without authority in law, and detrimental to the lawful rights and best interests of the citizens of said township. Touching the truth of all of which the undersigned pray to be heard and so inform the court."

Accompanying this remonstrance was an exhibit which contained a list of two hundred and twenty-seven names of "non-assessed tax payers therein on said petition, and duplicated names, as appears from assessor's books for the year 1889." This exhibit contained two hundred and fifteen names which the remonstrance asserted did not appear upon the assessor's books of the county for the year 1889, as tax payers, though they did appear upon the petition for the dramshop license in question. It also contained twelve names which the remonstrance asserted had been duplicated upon the petition for the dramshop license. This exhibit was supported by the following affidavit:

"We, the undersigned, make oath and say that we have since examined the names contained in the petition

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aforesaid, with the last said county assessor's book for the said Central township, to-wit, the year 1888, and find that said petition contains the names heretofore attached, aggregating the number of two hundred and fifteen names, who do not appear as assessed tax payers of said Central township, and, also, the names of twelve assessed tax payers therein as duplicated on said petition, as per exhibit "A." herewith filed. And further find thereon the further names to the number of fifty-three by us illegible. And do further find from a personal examination of said assessor's book for Central township, being the latest assessment of said township, that there are in said Central township a total of twenty-five hundred and seventy-three assessed tax payers, real and personal, of whom there are fourteen hundred and fifty-three personal property assessed tax payers (citizens); and that the number of assessed personal tax payers on said petition, as taken from said assessor's book, are four hundred and thirty-three, out of the whole number of petitioners thereon, to-wit, six hundred and sixty petitioners."

This affidavit, apparently drawn with the intention of being sworn to by several persons, was sworn to by G. A. Moody alone.

This application was argued at the bar on the day before the final adjournment of the term by counsel for the relators, by the prosecuting attorney for the county court justice, and by counsel for Mr. Horch, the licensee. We have only time to indicate briefly the conclusions at which we have arrived :—

I. The first question is whether a proceeding of this kind can be prosecuted in this court at the relation of the assessed tax-paying citizens, or whether it is not essential that it should be prosecuted at the relation of the attorney general of the state or of the prosecuting attorney for St. Louis county. The petitioners came into court and asked special leave of court to institute this proceeding in the name of private assessed tax-paying citizens of the township. They stated in their

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petition that they have applied to the attorney general of the state, and to the prosecuting attorney of said St. Louis county, for permission to make this application at their relation, respectively, but that, in both instances, permission has been refused. This statement has not been controverted, and the prosecuting attorney of St. Louis county has assented to the truth of it so far as he is concerned. We understand that the reason why the attorney general refused the use of his name was that he regarded it as a local affair which should be prosecuted in the name of the prosecuting attorney; and that the reason why the prosecuting atttorney in like manner declined the use of his name was that there is a statute requiring him to appear in such cases for the county court,—which rendered it inconsistent with his views of duty to act at once as the prosecuting officer and as counsel for the respondents. We incline to think that his views of duty were correct, and, in consequence of the refusal of the attorney general and prosecuting attorney of the county to institute the proceeding, we also think that, to prevent a possible failure of justice, it was within our discretion to grant the writ upon the application of assessed tax-paying citizens of the township. Our statutes relating to dramshop licenses recognize the principle that the granting of a dramshop license is of interest to the assessed tax-paying citizens of the cities, towns or municipal townships, by making it a condition precedent to the granting of such license that the applicant shall support his application by the petition of at least a majority of the tax-paying citizens of the city, incorporated town or municipal township containing twenty-five hundred inhabitants or more; and we think we merely carry out the policy of this statute in recognizing the right of citizens of the municipality or township remonstrating against the issuing of the license to remove the record of the county court to a superintending court for the purpose of having the question determined whether it has been granted in a case within the jurisdiction of the county court.

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II. The next inquiry is whether the act of issuing this dramshop license was a judicial or a ministerial proceeding. It is conceded that the common-law writ of *certiorari* lies only to superintend the action of inferior tribunals when they act judicially, and that it does not extend to a superintendence of their acts when they act ministerially. We are of opinion that in this case the county court acted judicially. By the terms of the statute (Laws of 1883, p. 87, sec. 4) they *may* grant the license, if the petition is signed by a majority of the assessed tax-paying citizens of the municipal township; and by the terms of section 1 they *shall* grant it, if the petition is signed by *two-thirds* of the assessed tax-paying citizens of the municipal township. Within these limits they have the discretion of granting or refusing it. That this discretion is *judicial* in its nature is shown by the decision of this court under the former statute in *State ex rel. v. Hudson*, 13 Mo. App. 61, and decisions of the supreme court there cited, holding that "it is within the sound discretion of the county court, where the statute has been complied with by the applicant, to confer or to withhold this privilege," and that "this discretion cannot be revised or controlled by any court having superintending jurisdiction over the county court, by writ of *mandamus*." This shows beyond all question that the act is a judicial act; for, if it were a mere ministerial act, performance of it could be compelled by *mandamus*.

III. The next question is whether there has been any application in writing to the county court within the meaning of section 5438 of the Revised Statutes, as amended by the act of March 24, 1883, known as the Downing law. Laws of 1883, p. 86, sec. 1. By this section it is provided: "Applications for a license as a dramshop keeper shall be made in writing to the county court, and shall state, specifically, where the dramshop is to be kept; and if the court shall be of opinion that the applicant is a person of good character, the court

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may grant a license for six months," etc. It is argued on behalf of the relators that there has been no application in this case, since the petition of the tax-paying citizens, upon which the license was granted, should not be regarded as an application for a license as a dramshop keeper within the meaning of the statute. We are inclined to think that this position is too refined. There is here a "petition for dramshop license." It is in writing. It states the place where the dramshop is to be kept at Webster Groves in Central township. Although it is not in form the petition of the applicant for the license, yet it appears to be upon a printed form which has been adopted for such applications, and his affidavit is endorsed upon it to the effect that the petitioners contained in it comprise a majority of the tax payers of the township. We think we should take too strained a view to hold that this may not be regarded as an application within the meaning of the section of the statute above quoted.

IV. But the next point is fatal to the application. The application is made by "*tax payers* of Central township in St. Louis county." The statute recites: "It shall not be lawful for any county court in this state, or clerk thereof in vacation, to grant any license to keep a dramshop in any town or city containing two thousand, five hundred inhabitants or more, until a majority of the *assessed tax-paying citizens* in the block or square in which the dramshop is to be kept, shall sign a petition asking for such license to keep a dramshop in such block or square in such town or city; nor in any city containing less than two thousand, five hundred inhabitants, nor in any incorporated town or municipal township, until a majority, both of the *assessed tax-paying citizens* therein, and in the block or square in which the dramshop is to be kept, shall sign a petition asking for such license to keep a dramshop therein, which said petition shall be filed in the office of the clerk of the county court, and by said clerk

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laid before the court at the first term thereafter, and be renewed on the fourth day of July, every year thereafter." Revised Statutes, 1879, section 5442, as amended by the act of March 24, 1883, section 4 (Laws of 1883, p. 87). It is perceived that the petition does not comply with the statute in that it recites that the petitioners are "tax payers of Central township," instead of reciting that they are "assessed tax-paying citizens of Central township." It is also perceived that the affidavit of the applicant for the license endorsed thereon merely states that "the foregoing petitioners comprise a majority of the tax payers in Central township," etc. So far as appears from the petition the petitioners may be tax payers of Central township without being citizens. P it this does not comply with the law. They must be citizens as well as tax payers. Beyond this, they are recited in the petition merely as "tax payers," whereas the statute requires that the petitioners shall be "assessed tax payers." It is not enough that the petitioners are tax payers, for persons may be so regarded who are liable to be assessed for taxes, that is, who have taxable property within the township. They must be "*assessed* tax payers,"—that is to say, they must have been actually assessed for taxes. Point is given to this conclusion by the seeming fact, developed by the affidavit in support of the remonstrance, that two hundred names of the alleged tax payers upon this petition did not appear upon the assessor's books as tax payers of the township for the last preceding year.

It is a familiar principle, touching the jurisdiction of inferior tribunals which do not act according to the course of the common law, that their jurisdiction must appear on the face of their proceeding, otherwise it will be held that they have acted without jurisdiction. *State ex rel. v. Police Commissioners*, 14 Mo. App. 297, 310, and cases there cited. It is a principle constantly acted upon, in superintending these inferior tribunals,

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that where the statute predicates the right of affirmative action upon a petition by persons possessing a certain qualification, they have no jurisdiction to act, unless a petition is presented to them signed by persons possessing that qualification. Such is the case here. The statute requires that the petitioners shall be: (1) Citizens. (2) Assessed tax payers. But this petition neither purports to be the petition of citizens, nor that of assessed tax payers. The presentation of it to the county court, therefore, gave the court no jurisdiction to issue the license in question, and its order issuing the license is therefore void.

V. We might stop here, but another interesting and important question is presented by the record. Section 4 of the act of 1883, as above quoted, recites that "said petition shall be filed in the office of the clerk of the county court, and by said clerk *laid before the court at the first term thereafter.*" In this case it does not appear to a certainty on what day this petition was filed with the clerk of the county court, or that it was ever filed with such clerk. It contains no file mark by the clerk, which is the usual evidence of the date of a paper being filed with the clerk; though the remonstrance of June 17, and the exhibit filed with it, do contain the clerk's file mark. Neither does the record of the county court, granting the dramshop license as above set out, recite that the petition was filed with the clerk on any day before the May term of the county court at which it was acted upon by the court. The question for decision under this clause of the statute is whether the statute is merely *directory* or whether it is *mandatory*. We are of opinion that it is *mandatory*. We think that it means what it says, and that, in order to give the county court jurisdiction to grant the license, a petition, conformable to the statute, must have been filed with the clerk of the court and presented to the court by the clerk *at the next term after being so filed.* We think that the plain object of the statute

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was to prevent what appears to have happened in this case,—to prevent the application being filed on a day of a term of the county court when the court is in session, and being acted on immediately by the justices, without an opportunity on the part of dissenting citizens to be heard. It seems clear to us that the provision of the statute requiring it to be, by the clerk, laid before the justices at the next term after being filed with the clerk, was intended to secure that delay which is ordinarily necessary to enable remonstrating citizens to make such an investigation as will satisfy them whether or not the petitioners are a majority of the assessed tax-paying citizens of the municipality. We wish carefully to avoid being understood as deciding any controverted question of fact in this case. We understand that the common-law writ of *certiorari* is not a substitute for an appeal or writ of error, but that, in the use of this writ, the superintending court is limited to what appears, or fails to appear, on the face of the record of the inferior court. But the fact, seemingly disclosed by the affidavit of Mr. Moody, that the persons signing this petition for a dramshop license may not have constituted more than one-third of the assessed tax payers of the county, while not referred to as a ground of our decision, is nevertheless suggestive as an argument in favor of our view of the meaning of this clause of the statute.

VI. This suggests another question, which, though not necessary to our decision, deserves observation. When the remonstrance of the citizens was presented on June 17, supported by the exhibit marked "A," which included the affidavit of Mr. Moody, which affidavit exhibited a state of facts which, if true, showed beyond question that the justices had acted illegally, in granting the license, without having before them a petition signed by a majority of the "assessed tax-paying citizens of the township," they refused to reconsider their action, and, according to their record above recited, placed their refusal upon the apparent ground

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that they had exhausted their power by making the order on the third of June. Their record recites: "It now appears to the court that, on the third day of June, 1889, a dramshop license was issued and granted to him by order of the court, and the same is *therefore* approved;" which can only be understood as meaning that, *because* the justices had granted it, whether rightly or wrongly, it was now, therefore, approved. We are of opinion that, where any judicial or *quasi* judicial tribunal holds regular terms in pursuance of law, any judicial or *quasi* judicial act done by the court remains within the power of the court for amendment, revision or revocation until the lapse of the term; and we have so held.

The judgment of the court is that the order of the county court of the county of St. Louis, entered on June 3, 1889, and approved by said court on June 17, 1889, granting to Henry Horch a license to keep a dramshop in Webster Groves for six months from the third day of June, 1889, be reversed, quashed and annulled.

Judge BIGGS concurs. Judge ROMBAUER is absent.

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37 352 / 137m 42 / 71 108
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JULIUS CONRAD *et al.*, Appellants, v. JOHN J. FISHER *et al.*, Respondents.

JULIUS CONRAD, Administrator of HELENA PAULSEN, Appellant, v. JOHN J. FISHER *et al.*, Respondents.

HENRY SCHLOETER, Appellant, v. JOHN J. FISHER *et al.*, Respondents.

St. Louis Court of Appeals, January 2, 1889.

1. **Vendor's Lien:** NOT A RIGHT OF RESCISSION. The right to enforce a vendor's lien in respect of goods sold upon a credit is not a right to rescind the contract of sale, but is a right to detain the goods until the indebtedness for the purchase price is discharged at or before the expiration of the credit, and, if not so discharged, to sell them and apply the proceeds of their sale to the liquidation of the indebtedness.

2. ——— : NOT WAIVED BY TAKING OTHER SECURITY. It is an additional security for the payment of the purchase price, and is not waived by the act of the vendor in resorting to any other security which he may have, provided such security is not in itself a security of such a nature as waives or discharges the lien.

3. ——— : CONVERSION : ATTACHMENT : EVIDENCE TO SHOW A CONVERSION BY ONE OF SEVERAL ATTACHING CREDITORS. A collection of facts stated, in which it appeared that several attachments were sued out by different creditors of a common debtor, apparently at the same time, all of them acting through the same attorney; that the different writs came into the hands of the sheriff within a few minutes of each other; that they were all levied on the following day, apparently at the same time; and that subsequently, on motions of the several plaintiffs, the suits were consolidated and proceeded to judgment together. It is *held* that this evidence exhibited such a concert of action as authorized the trier of the facts to find that all the attaching creditors were joint actors, and that either of them was guilty of a conversion in case any of the levies should be adjudged tortious.

Conrad v. Fisher.

4. **Pledge**: CHATTEL MORTGAGE: DELIVERY OF BILL OF SALE, WAREHOUSE RECEIPT, ETC. The delivery, as collateral security, of a bill of sale, copies of gaugers' returns, and a warehouse receipt of whiskey held in the United States bonded warehouse, creates a pledge, and not a chattel mortgage.

5. ———: PLEDGE MAY BE CREATED BY SYMBOLICAL DELIVERY. Where, from its situation, personal property is not susceptible of actual delivery, manual delivery is not essential to the creation of a pledge; it may be created by a symbolical delivery,—as by the delivery of a bill of parcels and a warehouse receipt.

6. ———: ATTORNMENT OF WAREHOUSEMAN NOT NECESSARY. The English doctrine which, in the case of a pledge by a symbolical delivery, requires an attornment by the warehouseman or other custodian of the goods, in order to create such a delivery as will support the pledge, is not in force in this country.

7. ———: WAREHOUSE RECEIPT: FOR GOODS STORED IN THE WAREHOUSE OF THE RECEIPTER. The owner of goods stored in his own warehouse cannot make a valid pledge of them, by issuing to another an instrument in the form of a warehouse receipt, in which he professes to hold the goods for that other. Such an attempt to create a pledge is void, as being contrary to the provisions of our statute relating to chattel mortgages, which requires a delivery of possession or a recording in the office of the recorder of deeds. (R. S. 1879, sec. 2503.)

8. **Foreign Law**: PROVED AS A FACT. The law of a sister state of the American union is a foreign law in the sense that it is not judicially noticed in the tribunals of this state, but must, in order to have effect here, be proved as a fact.

9. ———: PRESUMPTION IN CASE NOT PROVED. The burden of proving the law of another state rests upon the party claiming rights under it, and, in the absence of such proof, the trial court is authorized to presume that the same rule of law, which obtains in this state, obtains in that state, it being founded in the principles of the common law, and not the necessary outgrowth of a local and peculiar statute.

10. **Contract**: INTERPRETATION: PRIOR COURSE OF DEALING. Where a contract is in writing and is so distinctly drawn as to leave no ambiguities for parol explanation, evidence of a prior course of dealing between the parties to it, and especially of a prior course of dealing between one of the parties to it and the predecessors of the other party,—cannot be appealed to to supply an interpretation of it.

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11. **Subsequent Parol Variation.** But it is competent to show that the parties in their dealings under the contract varied its terms by a subsequent parol agreement.

12. **Practice, Trial:** VENDOR'S LIEN: WHEN A QUESTION OF FACT. Where the facts are numerous and equivocal—susceptible of different inferences in respect of the question what was the real intent of the parties,—the question whether there has been such a delivery as divests the vendor's lien is a question of fact for a jury.

13. **Practice, Appellate:** CONCLUSIVENESS OF FINDING OF TRIAL COURT ON THE FACTS. In such a case, in an action at law, the inferences of fact made by the trial court are not reviewable on appeal, provided they are fairly within the scope of the evidence.

14. **Vendor's Lien, Incidents of:** THE LEADING INCIDENTS OF A VENDOR'S LIEN STATED. That it presupposes title in the vendee; that it is not a right of rescission, but of detention; that it arises by implication of law while the goods remain in the possession of the vendor and the purchase price is unpaid; that it is waived by stipulations in the contract of sale inconsistent with its exercise, as by giving time for payment and taking a negotiable security therefor; that this waiver takes place on the implied condition that the vendee will keep his credit good during the term of the credit; that it revives if, during such term, the vendee becomes insolvent, and that the insolvency, which revives it, is insolvency in the mercantile sense—an inability to pay one's debts as fast as they mature.

15. ———: BY WHAT DELIVERY DIVESTED: STATUTE OF FRAUDS. It is not a universal rule that the delivery of the goods which divests the vendor of his lien must be such a delivery, actual or constructive, as would amount to an "actual receipt" of the goods within the meaning of the seventeenth section of the English statute of frauds; nor is it a safe test in determining whether this lien has been divested to consider whether there has been such a delivery.

16. ———: CONSTRUCTIVE DELIVERY: NOT DIVESTED BY CONSTRUCTIVE DELIVERY, WHEN. As between the vendor and vendee, and in cases where the rights of subsequent purchasers of the vendee are not concerned, this lien is not divested by any species of constructive delivery, so long as the vendor retains the actual custody of the goods, either by himself or by his agent or servant.

17. ———: INVOICING THE GOODS. This lien is not destroyed by invoicing the goods to the purchaser.

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18. ———: MARKING THE PACKAGES. Nor is it destroyed by marking the packages with the purchaser's name. So *held* where the goods consisted of barrels of whiskey distilled in a distillery, which, by an arrangement between the contracting parties, sanctioned by the agents of the government, was run in the name of the vendee, and the barrels furnished by the vendor were branded with the name of the vendee as distiller and placed in the distillery warehouse.

19. ———: AGREEING TO HOLD THE GOODS AS WAREHOUSEMAN FOR VENDEE. Nor is this lien destroyed by an agreement between the vendor and vendee that the goods shall remain in the warehouse of the vendor subject to the payment of storage by the vendee. The doctrine of *Barrett v. Goddard*, 3 Mason (U. S.) 107, on this subject, denied, and the decision criticised.

20. ———: SOMETHING REMAINING TO BE DONE TO THE GOODS BY THE VENDOR. The fact that, by the agreement between the vendor and vendee, something remains to be done to the goods by the vendor, is not conclusive that there has not been such a delivery as cuts off the vendor's lien, but creates a *prima facie* presumption to that effect, which may be rebutted by circumstances. If the thing remaining to be done was intended to prepare the goods for delivery, the lien continues; but if the facts essential to a delivery have taken place, and the thing remaining to be done is merely in the nature of a subsequent service by the vendor with reference to the goods, the lien is discharged. When, therefore, the goods, at the time the contract of sale is made, though in the legal custody and control, are not in the actual possession of the vendee, but are so situated that he cannot obtain actual possession until a specific act is done by the vendor, if the vendee becomes insolvent before this act has been done, and the actual possession of the goods has not been changed, the vendor may detain the goods as security for the payment of the contract price.

21. ———: NOT DESTROYED BY PLACING GOODS IN GOVERNMENT WAREHOUSE. The lien of the unpaid vendor for distilled spirits is not destroyed by placing them in a government warehouse in charge of a government store-keeper. The custody of the government store-keeper is intended merely to secure the government in its revenue, and not to interrupt or impair the rights of any vendor, vendee or pledgee, beyond what the terms of the statute under which he holds possession absolutely require.

22. ———: CASE IN JUDGMENT. Where the contract stipulated for the doing of three things by the vendor before the delivery should be complete: (1) To give care and attention to the packages while in

the government warehouse, the same being the distillery warehouse of the vendor; (2) to place insurance upon the property, if so required by the vendee; (3) and, finally, to complete the delivery of the property itself by placing it free of charge on board the cars,—it was *held* that, presumptively, there had been no actual delivery until the last of these three things had been performed, unless the other circumstances surrounding the transaction were such as to repel the presumption, and whether they were was a question of fact.

23. ———: UNITED STATES INTERNAL REVENUE LAWS: DELIVERY TO THE "OWNER" WHEN TAX PAID. In the provisions of the revenue laws of the United States, which require the delivery of distilled spirits by the government warehouseman to the *owner* when the tax is paid, congress merely intended, by the use of a general word of description, to designate, without circumlocution or needless specification, any person who, upon the payment of the government dues, is in law entitled to the possession of the goods.

24. **Vendor's Lien:** NOT SELF-EXECUTING. The lien of an unpaid vendor of goods is not self-executing. It is a right which he may or may not assert, and which, if not asserted in time, is lost. If, therefore, the vendor, retaining the goods under a contract with the vendee in the vendor's distillery warehouse, allows the vendee to call the warehouse his own for the purposes of his trade, and to issue warehouse receipts in respect of the goods, the license thus given to the vendee to issue warehouse receipts does not, *ipso facto*, expire upon the happening of the vendee's insolvency.

25. **Pledge:** AS SECURITY FOR ANTECEDENT DEBT: PLEDGEE NOT A BONA FIDE PURCHASER FOR VALUE. Where goods which have been sold on credit remain in the possession of the vendor under such circumstances that his lien will revive upon the happening of the insolvency of the vendee, a pledge of the goods by the vendee to his creditor, as collateral security for an antecedent indebtedness, the creditor parting with no new value and making no agreement for delay, does not constitute the pledgee a purchaser for value, in such a sense as gives him a better right in respect of the goods than his pledgor and cuts off the lien of the unpaid vendor.

26. ———: WHEN PLEDGEE CANNOT INVOKE ESTOPPEL. In such a case the pledgee of the vendee cannot be regarded as having a better right than the vendee, on the principle of estoppel, unless he shows that what has been said or done by the vendee has in some way influenced the conduct of the pledgee to his detriment. The law will not presume, in the absence of evidence, that such was the fact.

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27. **Practice, Appellate:** AFFIRMANCE BECAUSE FOREIGN LAW NOT PROVED. Where the rights of the parties depended upon the law of Kentucky, and this circumstance was not brought to the attention of the trial court by either party, and such law was not proved as a fact, the court declined to affirm the judgment as being for the right party, on the theory that the pledge, under which the plaintiffs claimed, was not by the law of Missouri a valid pledge, when the court knew, as a matter of general learning, that it was a valid pledge under the law of Kentucky. On the other hand, the court declined to reverse a judgment for the defendants which rested on the ground that the title of the plaintiff was that of a pledgee of warehouse receipts as collateral security for an antecedent debt,—the law of Missouri on the subject being unsettled, and the law of Kentucky, by which the rights of the parties was governed, which had not been put in evidence in the trial court, being, on the analogous subject of commercial paper, that a pledgee for an antecedent debt is not a taker for value, but holds subject to prior equities.*

Appeal from the St. Louis City Circuit Court.—HON. GEO. W. LUBKE, Judge.

AFFIRMED.

David Goldsmith, for the appellants.

Silas B. Jones, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This case has been argued three times at very great length and with much ability on both sides,—the last time before the two judges who alone participate in this decision. Two other actions, Julius Conrad, Administrator of Helena Paulsen, appellant, *v.* John J. Fisher *et al.*, respondents, number 3711, and Henry

*The above *syllabi* were prepared by Judge THOMPSON at the request of the reporter. The publication of the opinion at the end of the decisions of the St. Louis court of appeals for the March term, 1889, is due to the fact that the motions for rehearing, filed by the appellants, were not decided until the close of that term

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Schloeter, appellant, *v.* John J. Fisher *et al.*, respondents, number 3712,—have also been argued and submitted together with this case. The three actions are of the same nature, arising out of the same transaction, and depending upon the same principles of law. They were tried together before the same judge sitting as a jury, and judgments in all of them were entered for the defendants. They are presented in this court for review upon a single bill of exceptions, by a stipulation of the parties. This opinion will dispose of the other two cases, as well as of this case.

Each of these three cases is an action for the conversion of certain whiskey at Silver Creek, in Richmond county, Kentucky. The facts, so far as it seems necessary to state them at the outset, were as follows: During the time when the rights in controversy arose, Charles W. Conrad was doing business in St. Louis, Missouri, under the name and style of C. Conrad & Co. The defendants were partners in two different firms (Gregory, Stagg & Co. and W. S. Hume & Co.) engaged in the business of distillers and rectifiers at Silver Creek, Kentucky. A third firm, Stagg, Hume & Co., and also the two firms above named, of which they were successors, had had a course of dealing with C. Conrad & Co., similar to that which took place under the contract hereafter set out upon which the rights now to be disposed of depend. There is a great amount of testimony in the record as to the nature of this course of dealing, and 'the facts adduced by this testimony are set out at considerable length by the appellants in their statement, of which we shall speak hereafter.

As introductory to the contract itself, it may be stated that Conrad, doing business at St. Louis under the name of C. Conrad & Co., had acquired an extensive reputation for a certain kind of beer, which had been brewed and bottled for him in St. Louis, and which he had sold under the name of Budweiser beer. He desired

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to found a similar reputation in respect of certain kinds of whiskey; but, as he was not a distiller, it was necessary to find a distiller who would make for him whiskey of the desired grade, and who would assist him in holding himself out to the world as the distiller of it. The defendants were willing to make such whiskey for him and to assist him in representing himself to the public as the distiller of it. In order to carry out this purpose, the following contract was entered into:—

"This agreement made and entered into this twenty-fifth day of October, 1882, between Stagg, Hume & Co., of St. Louis, Missouri, of the first part, and C. Conrad & Co., of St. Louis, Missouri, of the second part, witnesseth:

"That the party of the first part agrees to make for the party of the second part, during the months of November and December, 1882, and January, 1883, at the Silver Creek distillery in Madison county, Kentucky, twenty-one hundred barrels of Moss Rose Sour Mash Bourbon whiskey, and four hundred barrels Governor's Choice Rye whiskey, at forty-six and one-fourth cents per proof gallon for the Bourbon, and sixty-two and one-half cents per proof gallon for the Rye—the Bourbon to be invoiced when all made, and the Rye to be invoiced when all made, as per return of United States gauger on duty at distillery.

"That during the manufacture of the whiskey, herein contracted for, the firm name of the party of the second part (Conrad & Co.) shall be used as distillers, provided that the said party of the second part shall not, in any way, be held responsible or liable to the United States government for the conduct of the distillery.

"That settlement for the whiskey shall be made as follows: The party of the second part shall give their notes, or acceptances, each for six hundred dollars, payable, the first note on June 16, 1883, and a note

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payable on the Saturday of each week following, until all are paid. That the whiskey shall be of the standard quality of the "Hume" brand, the cooperage first class, eight-iron-hooped barrels, well charred, branded with the firm name of the party of the second part as distillers—all brands required to be furnished by the party of the first part—the packages to contain from forty-six to fifty gallons each, and the proof of the whiskey to run as nearly uniform at one hundred and one per cent. as it is possible to make it.

"That storage shall be charged at the rate of five cents per barrel per month from date of entry into United States warehouse number 541, eighth district of Kentucky, and that all care and attention shall be given the packages while in store by the party of the first part.

"That, upon the release from bond and payment of United States and state taxes and storage by the party of the second part, packages shall be delivered, free of charge, by the party of the first part, on board of the cars at Silver Creek, Kentucky.

"That the party of the first part, if desired to do so by the party of the second part, shall place insurance, loss, if any, payable to the party of the second part, who shall pay the premium at not to exceed current rates.

"That, if from fire or other casualty, the party of the first part shall be unable to comply with the terms of this contract in full or in part, the said party of the first part shall not in any way be held liable for such non-fulfillment of contract.

"That, when the whiskey is all invoiced and the notes are given for the amount, the party of the first part agrees to pay to the party of the second part two hundred and fifty dollars, in consideration of which the party of the second part agrees to give the party of the first part two cases containing twelve quart bottles of the best French champagne and two casks of Budweiser beer.

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"Witness our hands this twenty-fifth day of October, 1882, at St. Louis, Mo.

"(Signed) STAGG, HUME & Co.,
"C. CONRAD & Co."

The whiskey in controversy was made (or caused to be made in the manner hereafter stated) by Stagg, Hume & Co., under this contract, and was placed in United States bonded warehouse number 541, as therein provided for. On the ninth of February, 1883, Conrad, being in failing circumstances and being indebted to these plaintiffs in various amounts which had long been due, delivered to each one of them, without their solicitation, a warehouse receipt for a quantity of this whiskey, as collateral security for the indebtedness owing to them, they asking him no questions and he making to them no statements at the time as to why he did this. On the sixteenth of the same month he suspended payment and his insolvency became known and published; and on the twenty-fifth he made an assignment for the benefit of his creditors. Meantime the plaintiffs had taken no steps to withdraw the whiskey from the government warehouse, but merely held the warehouse receipts, parting with no new value for them. The notes given by Conrad to Stagg, Hume & Co. for the whiskey were in their possession, not negotiable, and unpaid at the time of his suspension. Conrad was insolvent to the extent that, although much of his indebtedness was secured, his unsecured creditors received from the administrator of the unpledged assets of his estate no more than ten cents on the dollar.

Soon after his suspension, Stagg, Hume & Co. sued out an attachment in Richmond county, Kentucky, to enforce a vendor's lien upon the whiskey. The other two partnership firms already named (Gregory, Stagg & Co. and W. S. Hume & Co.), of which two firms the defendants were members, being creditors of Conrad on other accounts, sued out other attachments. These

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attachment suits were, by agreement of the various attaching creditors, consolidated, and in the consolidated suit judgment was rendered for the plaintiffs, fixing their respective priorities. The property was sold thereunder; and, although Stagg, Hume & Co. proved up their claim as holders of the notes given by Conrad for the purchase price of the whiskey before the assignee of his estate, and received a dividend in common with the other creditors, yet the total amount which was realized from the sale of the whiskey in Kentucky in the various attachment suits, added to the dividend thus received by them, was not sufficient to liquidate the indebtedness evidenced by the notes given by Conrad to them for the purchase price of the whiskey.

We understand it to be the settled law that the right to enforce a vendor's lien, in respect of goods sold upon a credit, is not a right to rescind the contract of sale, but is a right to detain the goods until the indebtedness for the purchase price is discharged at or before the expiration of the credit, and, if not so discharged, to sell them and apply the proceeds of their sale to the liquidation of the indebtedness. *Babcock v. Bonnell*, 80 N. Y. 244; *Chandler v. Fulton*, 10 Tex. 2; s. c., 60 Am. Dec. 188, 199; *Newhall v. Central Pacific Railroad*, 51 Cal. 345; s. c., 21 Am. Rep. 713. It is an additional security, and is not waived by the act of the vendor in resorting to any other security which he may have, provided such security is not in itself a security of such a nature as waives or discharges the lien. Hence, there was nothing incompatible in the act of Stagg, Hume & Co., in proving up their claim before the assignee of Conrad, and receiving a dividend from his estate in its administration, under the assignment law of Missouri, in common with other creditors, and in their also proceeding by such means as the law of Kentucky left available to them to enforce their vendor's lien upon the whiskey in the bonded warehouse at Silver Creek in that

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state; nor is such a contention made on behalf of the plaintiffs. Moreover, as they did not realize enough from both sources—that is, from the dividends received from Conrad's assignee and from the proceeds of the sale of the whiskey under their attachment in Kentucky, to satisfy the notes given for the purchase money, it must follow that, if they had a vendor's lien which they were entitled to enforce against the whiskey, the existence of such a lien is a complete defense to these actions for conversion, provided the title of the plaintiffs is not better than that of Conrad, their transferor. The strength of this conclusion has been seen by the learned counsel for the plaintiffs, and therefore his chief effort has been to convince the court that Stagg, Hume & Co. had no vendor's lien upon the whiskey in controversy.

Before proceeding to the consideration of the question, it is necessary to get out of the way two other objections raised by the defendant; because, assuming that these objections properly arise upon the record, if they are well taken, they require an affirmance of the judgment, which was given for the defendant, irrespective of the question whether or not Stagg, Hume & Co., had a vendor's lien upon the whiskey.

I. The first of these objections is that there is no evidence in the record tending to show a *conversion.* In order to understand the grounds upon which this objection is placed, it is necessary to recall the facts that the whiskey was seized under four attachments, simultaneously levied upon it at Silver Creek, Kentucky, by three different firms; that these firms were composed in the aggregate of numerous parties, and that the two defendants who alone are sued in these actions (process having been returned as to the others "not found"), are James A. Gregory and John J. Fisher, neither of whom was a member of the firm of Stagg, Hume & Co., the makers (through the Silver Creek Distilling Company) of the whiskey under the contract

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with Conrad above set out. These three partnership firms were Stagg, Hume & Co., composed of Stagg, of Hume and of Taylor, Jr.; W. S. Hume & Co., composed of Fisher, Gregory, Stagg, Hume and Embry; and Gregory, Stagg & Co., composed of Gregory, Stagg, Fisher and Hume. The defendants Fisher and Gregory were members of the firm of W. S. Hume & Co., and also of the firm of Gregory, Stagg & Co. On January 23, 1883, four suits were instituted by these various firms against Charles W. Conrad, in the court of common pleas in Madison county, Kentucky, two of them known as number 1 and number 2, by Stagg, Hume & Co., the makers of the whiskey and the parties of the first part in the contract above set out; one of them by W. S. Hume & Co., and one by Gregory, Stagg & Co. In all these suits attachments were sued out against the property of Conrad. In the suit of Stagg, Hume & Co., known as number 1, the effort was to enforce a vendor's lien upon the whiskey in controversy. The writ of attachment issued in this suit came into the hands of the sheriff of Madison county, Kentucky, at three minutes past ten o'clock in the evening of the same day; the writ in the action of W. S. Hume & Co. came into his hands at ten minutes past ten o'clock in the evening of the same day; and the writ in the action of Gregory, Stagg & Co. came into his hands at twelve minutes past ten o'clock in the evening of the same day. The three writs were all levied, on the next day, on the whiskey in controversy, by a notice to the person in charge of the warehouse where it was stored. Possession of the whiskey was never taken nor disturbed under any of the writs. The cases were managed for the several plaintiffs by the same attorneys. They were consolidated for trial, and judgment was given, setting out the rights of each of the plaintiffs, there being other whiskey involved besides that in controversy here, and adjudging a prior right and lien in favor of Stagg,

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Hume & Co. to the whiskey in controversy, which was sold to satisfy their lien, but which, as already stated, did not bring enough to satisfy it. Neither W. S. Hume & Co., nor Gregory, Stagg & Co., got any part of the proceeds of the sale of the whiskey in controversy. No effort was made in the court below to show that in point of fact the attachment of W. S. Hume & Co., or that of Gregory, Stagg & Co., in any way interfered with the rights of these plaintiffs. But the plaintiffs rested upon the position that what was done under the attachments was *per se* a conversion of the whiskey in controversy, and the defendants now insist that such is not the law. The circuit court adjudged this point against the defendants, and we are unable to say that its conclusion was wrong. It is clear to our minds that there was here evidence tending to show such a concert of action among the four attaching creditors as placed all of them in the position, if the attachments were wrongful, of co-trespassers or joint tort-feasors, within the meaning of the rule laid down by this court at the present term in the case of *Leeser v. Boekhoff*, 33 Mo. App. 223, and the cases there cited; and the sufficiency of this evidence was a question of fact for the trial court, sitting as a jury. It is perceived that the attachments were sued out apparently at the same time, by the parties acting through the same attorney; that the different writs came into the hands of the sheriff within a few minutes of each other; that they were all levied on the following day, apparently at the same time, for the hours of the several levies are not specified in the sheriff's return; and that subsequently, on motions of the several plaintiffs, the suits were consolidated and proceeded to judgment together. The fact that the attachment which first came into the hands of the sheriff may, by operation of law, have taken precedence in the first distribution of the fund does not, we think, at all negative the conclusion that there was such concert of action as

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made all the parties liable as co-trespassers, in case the levies should be adjudged tortious. The levies, it may be assumed, took effect by relation as of the respective dates when the different writs came into the hands of the sheriff. But this doctrine of relation is to be regarded as a fiction resorted to for the purpose of determining the priorities of the attaching creditors as among themselves, and not for the purpose of determining the liability of any one of them as between himself and the defendant in the attachment suit.

II. The next position of the respondent is that the delivery of the bill of sale, copies of gaugers' returns, and so-called warehouse receipts created a mere *pledge*, which was invalid, because there was no delivery. It is not disputed that these papers were delivered to the plaintiffs as collateral security, and not in payment. The transaction, therefore, constituted a pledge or mortgage. That it constituted a pledge, and not a mortgage, can scarcely be the subject of doubt. A bill of sale of chattels, absolute on its face, may, indeed, be shown by parol evidence to have been intended as a mere security for a debt. *Newell v. Keeler*, 13 Mo. App. 189. Such was the undisputed evidence here; and whether it was a mortgage or a pledge was a question of law. If it were a mortgage and not recorded, it would not be good against creditors of the mortgagor, unless accompanied by delivery. In that respect it would stand on the same footing as a pledge; for delivery is essential to the validity of a pledge. These warehouse receipts were evidently intended to make a symbolical delivery to the plaintiffs, as security for their respective debts. This would make a pledge, provided a pledge can be created by such an instrument, and by no other delivery, actual or constructive. This is shown by the following case: *Parshall v. Eggart*, 52 Barb. (N. Y.) 367; s. c., affirmed on this point though reversed on another, 54 N. Y. 18. This view is also confirmed by numerous holdings to the

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effect that taking a bill of sale or bill of parcels of personal property, absolute in its terms, as collateral security merely, amounts only to a pledge. *Walker v. Staples*, 5 Allen (Mass.) 34; *Thompson v. Doliver*, 132 Mass. 103; *Kimball v. Hildreth*, 8 Allen (Mass.) 167; *Morgan v. Dod*, 3 Colo. 551.

But it does not follow that a valid pledge can be created only by manual delivery of the property pledged. Where, from its situation, the property is not susceptible of actual delivery, a valid pledge may be created by symbolical delivery. *Ex parte Fitz*, 2 Lowell (U. S.) 519; Jones on Pledges, sec. 36. Thus, property in transit may undoubtedly be pledged by the deposit of a bill of lading. *Meyerstein v. Barber*, L. R. 2 C. P. 38; s. c., affirmed, *Ib.* 661, and in L. R. 4 H. L. 317. We have held in this court that goods in a warehouse may be pledged by delivery of the warehouse receipt, even without its being endorsed by the pledgor. *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399. That goods in the hands of warehouseman may be pledged by a transfer of the warehouse receipt, was again held by this court in *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 341, and has been held by other courts in numerous cases. Jones on Pledges, secs. 280, 298, 302, and cases cited. That goods detained in the custom house to secure the payment of duties may be pledged by a written contract noted on the books of the chief officer of the custom house without actual delivery, was held by the English privy council, reversing the Canadian court of Queen's Bench, in *Young v. Lambert*, L. R. 3 P. C. 142.

This last case, however, involves an idea which seems to be fundamental in the English law, namely, that where goods are in the possession of a third party, in order to constitute such a constructive delivery as will support a valid pledge, there must be an *attornment* by the actual custodian. SIR JOSEPH NAPIER, in giving

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the judgment of the court in the case just cited, said: "It appears to their lordships that, by the express agreement of the parties in this case, followed by the acceptance of the chief warehouse keeper, there was a valid constructive delivery of the property comprised in the contract." *Ib.* 156. But our law does not seem to require an attornment in order to complete a symbolical delivery. *Davis v. Russell*, 52 Cal. 611. The decisions in this state do not give countenance to such an idea, although in Massachusetts they have followed the English rule. *Hallgarten v. Oldham*, 135 Mass. 1. But Mr. Jones, in his very satisfactory work on pledges, speaks of this decision as "contrary to the general rule." Jones on Pledges, sec. 300. We should, therefore, have no difficulty in overruling the contention of the respondents upon this point, if we could regard these instruments as warehouse receipts.

But it has been held by this court, and by several other courts, that a receipt issued by the owner of goods, *stored in his own store*, is not a *warehouse receipt* at all. *Valley Nat. Bank v. Frank*, 12 Mo. App. 460; *Thorne v. First Nat. Bank* 37 Oh. St. 254; *Adams v. Merchants Nat. Bank*, 2 Fed. Rep. 174; s. c., 9 Biss. (U. S.) 396; *Yenni v. McNamee*, 45 N. Y. 614; *Farmers Bank v. Lang*, 87 N. Y. 209.

In *Valley Nat. Bank v. Frank*, *supra*, this court held that the issue by a merchant of a receipt for goods held in his own store, in the form of a warehouse receipt, had not the effect in law of a transfer of title, by means of a warehouse receipt, as against a subsequent innocent purchaser.

In *Thorne v. First Nat. Bank*, *supra*, it was held that an instrument substantially like a warehouse receipt, issued by a debtor to his creditor, on property owned by the debtor, who was not a warehouseman, for the sole purpose of securing such creditor, was void as against other creditors, where the property remained in

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the possession of the debtor. In the view which the court took, it was void as an attempt to create a lien upon personal property contrary to the provisions of the statute making chattel mortgages void unless accompanied by delivery of possession, or unless the mortgage be recorded—which statute is substantially similar to ours. R. S., sec. 2503.

In *Adams v. Merchants Nat. Bank*, *supra*, a similar ruling was made upon a similar state of facts and based upon similar reasons—the court holding that, in order to create a valid pledge by the transfer of a warehouse receipt, the receipt must be issued and transferred in compliance with the governing statute; otherwise, it will be regarded as in the nature of a mortgage, and void because not recorded or accompanied by the delivery of the property.

A similar ruling was made, and upon similar grounds, in *Yenni v. McNamee*, *supra*. This last case is also authority for the position that such an attempted pledge is not good under our statute relating to warehouse receipts. That statute recites: "All receipts issued or given by any warehouseman or *other person* or firm * * * are hereby made negotiable," etc. R. S., sec. 558. The New York statute contained the same recitals, using the words "or other persons." Yet it was held that a receipt issued by the owner of the goods, who held them in his own storehouse, was not a warehouse receipt; that the issuing of it to a creditor did not create a valid pledge, for want of transfer; but that it was an attempt to create a mortgage contrary to the provisions of the statute (similar to ours), requiring mortgages of chattels to be accompanied by delivery or else recorded.

In another case in the same state, a commission merchant procured a discount of his promissory note upon the following receipt as collateral: "Received in store, for account of Messrs. P. & S., subject to their order, the following named property, as security to pay

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note given this day" (describing the note and also the property thus attempted to be pledged). There was no manual delivery of the property, and no other symbolical delivery than was effected by the issuing of this receipt, but the property remained in the storehouse of the commission merchant as before. It was held: (1) That the receipt was not a chattel mortgage, and that, if it were, it was void as against the creditors of the mortgagor, because there was neither a delivery nor a recordation as required by the statute. (2) That the transaction did not, in legal effect, constitute a pledge, because it lacked the essential of delivery. (3) That the fact that the property was delivered to the attempted pledgee, before it was levied upon by the attachment under which the defendant justified, did not validate it as a pledge. *Parshall v. Eggart*, 52 Barb. (N. Y.) 367. On appeal from this ruling, the court of appeals of the same state held that the transaction was a pledge, and that, considered as a pledge, it was validated by the subsequent delivery before the rights of the attaching creditors supervened—leaving the ruling undisturbed on the other points. See s. c., 54 N. Y. 18.

A similar ruling was made under the provisions of the civil code of Louisiana (arts. 3125, 3129), where certain attempted pledgees, having allowed the pledgor to remain in possession of the goods which he had attempted to pledge to them, by issuing to them papers by which he professed to have received the goods from them on storage, were held not entitled to the rights of pledgees against subsequent purchasers. *Geddes v. Bennett*, 6 La. Ann. 516.

A ruling of Mr. District Judge Lowell in a case in bankruptcy is to the general effect that there might be, under circumstances, a valid pledge of cumbrous material, such as locomotive engines, by the delivery of bills of sale, although the property should remain in the possession of the pledgor. *Ex parte Fitz*, 2 Lowell (U. S.)

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519. But no allusion is made in that case to the existence or effect of any local statute requiring chattel mortgages to be recorded or to be accompanied by delivery, and I do not therefore regard that decision as authority in such a case as that before us. Besides, it does not seem to me to have been well decided upon its circumstances. It invests a bill of sale with the qualities which the mercantile law, for purposes of commerce, attaches to bills of lading and to warehouse receipts, and I do not find any well considered case that has gone to that extent.

But we find that it has been held in Kentucky, construing the statute of that state (Kentucky act of March 6, 1869), that a person, having goods stored in his own warehouse, may transfer title in them by issuing warehouse receipts (*Newcombe v. Cabell*, 10 Bush [Ky.] 460), and may, by issuing such a receipt, make a valid pledge to them to another,—placing such warehouse receipts on the same footing as similar receipts given by a warehouseman to the owner of the goods and by him transferred in pledge. *Cochran v. Ripey*, 13 Bush. [Ky.] 495; *Ferguson v. Northern Bank of Kentucky*, 14 Bush. [Ky.] 555. See also *Farmer v. Gregory*, 78 Ky. 475; *Greenbaum v. Megibben*, 10 Bush. [Ky.] 419. If the rights of the plaintiffs under these so-called warehouse receipts are governed by the law of Kentucky, then it is to be observed that the law of Kentucky is a foreign law which is not judicially noticed in the tribunals of this state, but which must, in order to have effect here, be proved as a fact (*Selking v. Hebel*, 1 Mo. App. 340; *Flato v. Mulhall*, 72 Mo. 522; *Meyer v. McCabe*, 73 Mo. 236; *Bergner v. Chicago, etc., Railroad Co.*, 13 Mo. App. 499); that the burden of proving what the law of Kentucky was upon this point was upon the plaintiffs; and that, in the absence of such proof, the circuit court was authorized to presume that the same

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rule of law which obtains in this state, obtains in Kentucky, it being founded in the principles of the common law, and not the necessary outgrowth of a local and peculiar statute. *Meyer v. McCabe, supra; Bergner v. Chicago, etc., Ry. Co., supra.*

It is also true that the supreme court of Michigan has held (approving the ruling in the Kentucky case of *Cochran v. Ripey, supra*) that a warehouseman having property of his own in store may, by issuing a warehouse receipt, make a valid pledge of it to secure his own indebtedness. *Merchants, etc., Bank v. Hibbard*, 48 Mich. 118. But, as the case stands, we should be bound to hold, following our own decision in *Valley Nat. Bank v. Frank, supra*, and believing that attempted pledges in this form, by a person of his own property in his own warehouse, are in contravention of the letter and policy of the statute already referred to relating to chattel mortgages—that these warehouse receipts were neither valid as pledges nor as mortgages, and consequently that the plaintiffs have exhibited no title and no standing in court—were it not for the fact, that it nowhere appears that this view of the rights of the parties was brought to the attention of the court below during the trial. If it had been, the plaintiffs could have obviated it by putting in evidence the report of the Kentucky case of *Cochran v. Ripey, supra*, thereby proving that the law of Kentucky on this subject is different from our own law. In this peculiar state of the record, we do not feel authorized to affirm the judgment on this point, as being for the right party, since we know as a fact that under the law of Kentucky, by which this contract of pledge is to be governed, it was a valid pledge.

III. This brings us to the main question which has been contested, namely, whether there was such a delivery of the property as divested the vendor's lien. In order to a proper understanding of this question, it

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will be necessary to state at considerable length the manner in which the parties executed the contract above set out. This statement would be less difficult, were it not for the various *aliases* under which the parties did business. The party of the first part was, as already stated, a partnership existing at Silver Creek, Kentucky, called Stagg, Hume & Co., but they executed their contract through a corporation organized under the laws of Kentucky, called the Silver Creek Distilling Company, which corporation was the owner of a distillery at Silver Creek, Kentucky, and also the owner of the government warehouse, number 541, into which, by the terms of the contract, the whiskey was to be and was in fact placed. It is perceived, by reference to this peculiar contract, that Conrad desired to be held out to the world as the distiller of this whiskey, and that Stagg, Hume & Co. were willing to assist him in holding himself out as such distiller. For this purpose, it was absolutely necessary, under the acts of congress relating to internal revenue, that the distillery should be run in the name of the assumed distiller, to-wit, in the name of C. Conrad & Co., and that the warehouse, which is an integral part of the distillery under such statutes, should be treated as his warehouse. For it must be borne in mind that, by the terms of those laws, each distillery has a warehouse, and that the spirits, as soon as distilled, must be at once conveyed to a receiving cistern (R. S. U. S., sec. 3267), whence they must, within three days, be drawn into casks, which casks must be directly removed to the distillery warehouse. As soon as the whiskey is thus removed to the distillery warehouse, each cask must be stamped with what is termed the distillery warehouse stamp, which stamp must contain, among other things, the *name of the distiller* and the serial number of the cask. With these provisions of the law in force, it would have been obviously impracticable for Conrad to attempt to hold himself out to the

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public as the distiller of whiskey distilled by some one else, unless he could in some way contrive to have his own name stamped upon the barrels by the officer of the government under the provisions of this law.

It therefore became necessary, in order to maintain before the public the simulation of C. Conrad & Co. being the distillers, that the government should in some sense recognize the fact that the distillery was the distillery of C. Conrad & Co., and the further fact that the warehouse was the warehouse of C. Conrad & Co. Accordingly, the Silver Creek Distilling Company, by whose agency Stagg, Hume & Co. executed the contract, gave the statutory notice to the collector that they proposed to manufacture a certain quantity of whiskey in their distillery at Silver Creek, Kentucky, "doing business as C. Conrad & Co.;" that is to say, for a purpose of their own, the Silver Creek Distilling Company proposed, while manufacturing this whiskey at this distillery, to change their names and take the name of C. Conrad & Co.; and the officers of the government, rightly or wrongly, were willing that they should do this.

Touching this matter, the plaintiffs have argued that, under the federal statutes, the firm name of C. Conrad & Co. could not be legally used as distillers, nor could the whiskey be lawfully branded with the name of that firm as distillers, nor could any other name be lawfully entered upon the stamps of that of the distiller, without actually running the distillery for them and altogether in their name—by which we understand them to mean that, whereas the distillery could not thus be lawfully run in the name of C. Conrad & Co., without their being the distillers, therefore they must have been the distillers. But we confess we cannot understand the force of this reasoning. It seems to us that this is equivalent to saying that whereas a man cannot lawfully do wrong in a given particular, yet if

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he had done wrong in that particular, therefore he has done right. Whether the distillery could lawfully be run, in the peculiar manner in which this distillery was run is a question between those who so ran it and the government of the United States, with which question we are not concerned. We allude to this merely because it is a branch of a similar line of argument upon which much contention of the plaintiffs rests; and it is just to their learned counsel to say that he seems finally to have abandoned it.

In order to carry out the peculiar provision of this contract by which C. Conrad & Co. should be held out as the distillers of this whiskey, without being in fact the distillers, it was of course necessary to keep up the simulation, in the face of the revenue officers, of C. Conrad & Co. being the distillers. With this end obviously in view, and with no other end in view, as the trial court was at liberty to find,—for any other end in view would contradict the contract and hence be absurd —the firm name of C. Conrad & Co. was put above the door of the warehouse, and it frequently happened that, when correspondence took place between C. Conrad & Co., at St. Louis, and the parties of the first part in this contract at Silver Creek, the letters were addressed by C. Conrad & Co., at St. Louis, to C. Conrad & Co., at Silver Creek; and the replies to such letters, generally written by Mr. Embry, the secretary of the Silver Creek Distilling Company, were in like manner signed C. Conrad & Co., though sometimes such letters were addressed to Mr. Embry in his own name and replied to by him in his own name. The parties of the first part to this contract, under the contract the distillers of this whiskey, the vendor's acting through the Silver Creek Distilling Company, as their agents, or they being the agents of the Silver Creek Distilling Company, it matters little which, for in either case there was a substantial identity between the parties,—were willing to call themselves C.

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Conrad & Co., and to be so called themselves. In these letters C. Conrad & Co., writing from St. Louis would sometimes speak of the warehouse as *our* warehouse, and whoever would reply to the letters from Silver Creek, would speak of the warehouse as *your* warehouse.

As has already been stated, the record contains much evidence of a course of dealing in reference to the manufacture of whiskey for Conrad, between him and the two firms which were predecessors in business at Silver Creek, Kentucky, of the firm of Stagg, Hume & Co., the party of the first part to the contract now under consideration, by which the whiskey now in controversy was made. This course of dealing took place under contracts similar in their terms to the present contract, and was a similar course of dealing to that which took place under the present contract. We mention this fact because great stress has been laid upon it in the able argument which has been made at the bar and submitted to us in print by the counsel for the plaintiffs. We do not perceive what precise bearing it has on the questions which we are to consider. It could at most be relevant as bearing upon the inferences of fact which the judge of the trial court, sitting as a jury, might be authorized to draw. But it is to be observed in this connection that the rights of the parties are to be governed by the written contract which they have made, and that a prior course of dealing, especially between one of the parties and other parties, cannot, on any principle with which we are acquainted, be appealed to as affording an interpretation of this contract—and more especially so as this contract is drawn in such distinct terms as to leave no ambiguities for parol explanation. Evidence of a course of dealing *under this contract* between the parties to it stands on a different footing, since it is competent for the parties to a contract to vary its terms by a subsequent course of dealing.

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There is evidence tending to show that its terms were varied, or at least supplemented, in one important particular. It nowhere confers upon C. Conrad & Co. the power to issue warehouse receipts in respect of the whiskey while remaining in the bonded warehouse at Silver Creek. And yet the evidence shows that he did issue such warehouse receipts, that some of them were returned to Silver Creek, and that deliveries of whiskeys were made upon them. The evidence in regard to his authority to issue these warehouse receipts is contradictory. The evidence in behalf of the plaintiffs tends to show that Conrad had acquired general authority from Stagg, Hume & Co., to issue warehouse receipts for whiskey in the warehouse at Silver Creek; the evidence of the defendants, on the other hand, tends to show that this authority was limited by the provision that the warehouse receipts should be returned to Silver Creek to be there registered—in other words, that Stagg, Hume & Co., or the Silver Creek Distilling Company, at Silver Creek, should have some sort of control over the matter. Conrad reported the issue of some of these warehouse receipts, by letters addressed to Embry, in "care of C. Conrad & Co.," at Silver Creek, and received replies thereto, signed by Embry, who was at the time the secretary of the Silver Creek Distilling Company.

The whiskey in controversy, when made, was deposited in the bonded warehouse number 541, at Silver Creek, in the name of C. Conrad & Co., in pursuance of the internal revenue statutes, the entry in the warehouse being made by the corporation as "The Silver Creek Distilling Company, doing business as C. Conrad & Co." The warehouse bonds were in like manner given by "The Silver Creek Distilling Company, a corporation organized under the laws of the state of Kentucky, doing business as C. Conrad & Co." These bonds were conditioned for the payment of taxes to the federal government. The whiskey was afterwards invoiced to C.

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Conrad & Co., of St. Louis, and was settled for by notes in pursuance of the contract. The whiskey was in this condition when, on the ninth of January, 1883, Mr. Conrad, at St. Louis, acting under the name and style of C. Conrad & Co., issued the warehouse receipts already spoken of, under which C. Conrad & Co. purported to have received, into their bonded warehouse at Silver Creek, two hundred and seventy-five barrels of whiskey for Paulina Vogelsang, fifty barrels for Elly Conrad, fifty barrels for Helena Paulsen, and forty barrels for Mr. Schloeter. Mrs. Vogelsang was the mother-in-law of Conrad; Elly Conrad was his sister-in-law; Helena Paulsen was his mother-in-law's sister; and Schloeter had formerly been his porter. His evidence tends to show that he was indebted to them in various sums, exclusive of interest, which debts had been of long standing and without security. Without any solicitation whatever upon the part of any of these creditors, he handed to them respectively the papers purporting to be warehouse receipts, together with bills of parcels and copies of gaugers' certificates, as collateral security for the debts which he owed them respectively. He asked no concessions whatever from them on handing them these papers, and they made no concessions to him whatever.

It should be here stated that the evidence requires us to lay out of view any conception or conjecture that this was a conveyance designed by Conrad to hinder, delay or defraud his creditors; for though the preference of relatives as creditors for alleged past due indebtedness is one of the common features of business failures, so much as to require that such preferences should receive careful scrutiny at the hands of triers of the facts, yet it is to be observed that there is no evidence in this case tending to show that these debts were not *bona fide* debts, or to take the case out of the ordinary case of a debtor in failing circumstances endeavoring to

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use his property to prefer some of his creditors. We wish to get the idea out of the way that we proceed upon any conception—the least possible—of these conveyances being simulated, or of their being made to the use of Conrad, and to make it clear that we deal with the rights of the plaintiffs precisely as we would deal with those rights if they were bankers whom Conrad had desired to secure for previous advances, made to him under circumstances which, in his view, rendered it obligatory upon him to secure them at the expense of other creditors. No fraud, either in fact or law, is imputable to the plaintiffs, nor is any imputable to Conrad, unless it be found in an unauthorized use of the authority which had been conferred on him to issue warehouse receipts—of which we shall speak further on.

In this connection it may be best to state, so far as they have not already been stated, the provisions of the Revised Statutes of the United States touching the custody of distilled spirits in bond before the taxes have been paid. The whiskey, removed, as already stated, to the bonded warehouse, must, within the first five days of the next succeeding month, be entered for deposit in the warehouse by the distiller or owner; and the distiller or owner must give bond for the payment, within the next three years, of the taxes due thereon. R. S. U. S. Sup., p. 530, sec. 4. It is also provided that the warehouse shall be provided by the distiller at his own expense, shall be situated on and shall constitute a part of the distillery premises, and shall be under the direction and control of the collector for the district, and in charge of an internal revenue store-keeper assigned thereto by the commissioner of internal revenue. R. S. U. S., secs. 3271, 3273. There is the further provision that it shall be in the *joint custody* of the store-keeper and the proprietor, but that it shall not be unlocked or remain open except in the presence of the

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store-keeper, and that no article shall be received into it, or delivered from it, by the store-keeper, except on the order of the collector. *Ib.*, sec. 3274. This last provision is supplemented by a regulation of the internal revenue department, as follows: "Whenever any person is allowed access to the distillery warehouse, it must be done under the immediate supervision of the store-keeper. The distiller, or his employes, may be allowed access to the warehouse for the purpose of examining the spirits, repairing the cooperage, or changing the packages to prevent waste." If the commissioner of internal revenue deems the warehouse unsafe, he may require the whiskey stored therein to be removed, under the direction of the collector, to such warehouse as he may designate, and may have it sold if the owner fails to have the removal made. *Ib.*, sec. 3272. It is further provided that, when the owner shall desire to withdraw the whiskey from the warehouse, he may file with the collector notice thereof, describing the whiskey, and requesting that it be re-gauged. R. S. U. S. Sup., p. 534, sec. 17. A "withdrawal entry" must then be made, stating the date of entry into the warehouse and by whom made, together with other matters of description; and thereon, upon the payment of the tax, the collector must issue his order to the store-keeper in charge of the warehouse for the delivery of the whiskey. R. S. U. S., sec. 3294. Thereupon the whiskey is re-gauged, and the cask is branded with the name of the distiller and stamped with the tax-paid stamp. R. S. U. S., sec. 3295. Thereafter it shall not be stored nor shall it be allowed to remain on the distillery premises. *Ib.*, sec. 3288. There is also a provision for the withdrawal of distilled spirits from the warehouse by the owner for exportation, without the payment of taxes. Sec. 3330.

Upon the foregoing facts the trial court has held that Stagg, Hume & Co., at the time when Conrad

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delivered the warehouse receipts to the plaintiffs, had such a possession of the whiskey as entitled them to a vendor's lien. The question now to be considered is, whether the facts admit of such an interpretation—not whether they do not admit of a contrary interpretation. For it is to be observed that where the facts are numerous and equivocal—susceptible of different inferences in respect of the question what was the real intent of the parties, the question whether there has been such a delivery as divests the vendor's lien, or puts an end to the right of stoppage *in transitu*, is a question of fact for a jury. *Chandler v. Fulton*, 10 Tex. 2; s. c., 60 Am. Dec. 188; *Michigan Central Railroad v. Phillips*, 60 Ill. 190, 193. On the analogous question, whether there has been such a delivery as will pass title and make an executed sale, the rule is the same. "Where the law can pronounce, upon a state of facts, that there is, or is not, a delivery and acceptance, it is a question of law to be decided by the court. But, where there may be uncertainty and difficulty in determining the true intent of the parties respecting the delivery and acceptance from the facts proved, the question of acceptance is to be decided by the jury." *Houdlette v. Tallman*, 14 Me. 400; *Glass v. Gelvin*, 80 Mo. 297, 300. More briefly, it is said: "When there is no dispute as to the facts, it is a question of law; when the evidence is conflicting, the jury must decide." *Glass v. Gelvin*, *supra; Hatch v. Bayley*, 10 Cush. (Mass.) 29. In the case before us the facts were very numerous, and on some points the evidence was conflicting. Interpreted in the light of the contract alone, they become comparatively simple. Interpreted independently of the contract, the inferences to be drawn from them are exceedingly doubtful. So far as they were properly susceptible of interpretation, independently of the contract, the inferences to be drawn from them were inferences of fact which addressed themselves to the judgment of the circuit judge, who

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tried the case, sitting as a jury. We cannot revise his conclusions of fact on this appeal unless we see, from his rulings upon the instructions, that he was mistaken in respect of the inferences of law to be deduced from certain facts. Here, as elsewhere, where the law characterizes a fact or a state of facts in a given way, if it appears from the record that the trial judge has characterized such fact or state of facts in a different way, it is within our office to review and correct his decision; but we have no control over his conclusions in respect of mere inferences of fact, provided they are fairly within the scope of the evidence. We shall take up, then, the leading incidents of fact which the evidence tends to show, and inquire whether the learned judge drew from them in any instance a conclusion contrary to that imputed by the law.

It may make our views clearer, if, before proceeding to do this, we state some of the established and leading incidents of a vendor's lien. To begin, it should be observed that the existence of a vendor's lien always pre-supposes that the title to the goods has passed to the vendee; since it would be an incongruous conception that a vendor might have a lien upon his own goods. In this case, the question of title is entirely out of the contest. The defense of a vendor's lien in Stagg, Hume & Co. concedes that the title to the goods had passed to Conrad.

It is next to be observed that a vendor's lien is in no sense a right of rescission. On the contrary, it proceeds in affirmation of the contract, and as a means of its enforcement. It is in the nature of a pledge raised or created by the law, upon the happening of the insolvency of the vendee, to secure the unpaid purchase money to the vendor. It is a mere right of detention and sale, to satisfy the unpaid purchase money. At the outset, in every sale, where the contrary is not stipulated, the implication of law is that the purchase price

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is to be paid, as a condition precedent, before the vendor shall be obliged to part with his goods. *Bloxam v. Sanders*, 4 Barn. & Cress. 941, 948; *Michigan Railroad v. Phillips*, 60 Ill. 190, 193; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 38. But this right to retain the goods until the purchase money is paid is waived by any stipulations in the contract of sale which are inconsistent with its exercise. *Pickett v. Bullock*, 52 N. H. 354. It is waived by giving time for payment, and especially by taking a bill or note to secure the payment of the purchase price. *Chambers v. Davidson*, L. R. 1 P. C. 305; s. c., 4 Moore P. C. (N. S.) 158; *Spartali v. Benecke*, 10 Com. Bench 212; *Dixon v. Yates*, 5 Barn. & Ad. 313; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 39; *Throop v. Hart*, 7 Duvall (Can.) 512, 521. But this waiver is said to take place upon the implied condition that the vendee will keep his credit good until the term of the credit shall have expired. *Arnold v. Delano, supra*; *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 406. If, therefore, the purchaser becomes insolvent before the goods are delivered, the lien at once revives. *Dixon v. Yates*, 5 Barn. & Ad. 313, 341; *Arnold v. Delano, supra*; *Throop v. Hart, supra*. Although there is some controversy as to the nature of the insolvency which will revive this right, ye'v it is agreed on all hands that an insolvency in theıe selcantile sense—an inability to pay one's debts retain it as they mature—evidenced by a stoppage of pnd rect, an assignment for the benefit of creditors, ang of n in bankruptcy, or the like—is sufficient. S *Baldey*nsolvency indisputably supervened in this case not be stagg, Hume & Co. undertook, by levying attaosition von the goods, to exercise their supposed right of are ded

There is a controversy in this case in rance t of the general theory of the law as to the nature oarol delivery which will divest the vendor's lien. The contention of the plaintiffs is that such a delivery, actual or constructive, as would amount to an "actual receipt" of

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the goods, within the meaning of the seventeenth section of the English statute of frauds, will, in all cases, operate to divest the lien of the vendor. This position is undeniably logical; but the cases in which this statement of doctrine is found are nearly all cases, in which the question in judgment was the statute of frauds, and not the vendor's lien. It would hence be extremely hazardous to rest our judgment upon what judges, however eminent, have said in cases where they were not considering the question which we are considering. Besides, a little examination will show that this contention is not a sound one. The single case of stoppage *in transitu* proves this. By all the authorities, when a carrier receives goods from a vendor for shipment to the vendee, there has been such an actual receipt as satisfies the statute of frauds; and by all the authorities there has not been such a delivery as puts an end to the right of stoppage *in transitu*. If it is answered that the right of stoppage *in transitu* is one thing, and that the vendor's lien is another thing, it is only necessary to appeal to the judicial reports to show that the two are universally regarded as the same right exercised under different circumstances. The right of stoppage *in transitu* is said to be a mere extension of the vendor's lien. *Babcock v. Bonnell*, 80 N. Y. 244; *Newhall v. Var*[illegible] 15 Me. 319; *Mohr v. Boston, etc., Railroad*, 106 Mas[illegible] 70; *White v. Welsh*, 38 Pa. St. 396, 420; *Loeb v. P*[illegible] 63 Ala. 243; s. c., 35 Am. Rep. 17, 19; *Newhall v. C*[illegible] *Pacific Railroad*, 51 Cal. 345; s. c., 21 Am. Rep[illegible]*wley v. Bigelow*, 12 Pick. (Mass.) 307, 313; *Bene*[illegible]*chaettle*, 12 Oh. St. 515, 521; *Schwabacher v. Ka*[illegible] App. 126, 129. It is simply the right which [illegible] accords to the unpaid vendor, upon the happen[illegible]f the insolvency of the vendee, to resume his po[illegible]on and with it his vendor's lien; and when his po[illegible]ssion is resumed his rights are worked out by a sale of the goods on notice, and an application of the

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proceeds to the payment of the purchase price, precisely as in the case of the vendor's lien. *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Boorman v. Nash*, 9 Barn. & Cres. 145; *Newhall v. Vargas*, 15 Me. 341. It follows from this statement, that, where the right of stoppage *in transitu* exists, the vendor's lien, *a fortiori*, exists. In other words, if there has been such a delivery, before the goods are started on their voyage, as cuts off the vendor's lien, there is no *transitus*, in the sense which supports the right of stoppage *in transitu*.

In view of these and other considerations, eminent judges have denied the proposition that the test, whether there has been a delivery to satisfy the statute of frauds, is a safe test of the non-existence of the vendor's lien. Robinson, C. J., in *Wegg v. Drake*, 16 Up. Can. Q. B. 252; Miller, J., in *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 407; *Townsend v. Hargraves*, 118 Mass. 325, 333. It has been held, on the most obvious grounds, that if a seller of merchandise, in order to maintain his lien for the price, refuses to permit the purchaser to take possession of it, but keeps it in his own personal custody, he thereby prevents an acceptance and receipt of it by the purchaser, such as is necessary to satisfy the statute of frauds. *Safford v. McDonough*, 120 Mass. 290. This is in accordance with what was said by Holroyd, J., that "as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute,"—meaning the statute of frauds. *Baldey v. Parker*, 2 Barn. & Cres. 37, 44. This need not be disputed, because the converse of the proposition is not necessarily true. On the other hand, there are decisions which affirm that there may be an acceptance which satisfies the statute of frauds in the case of a parol sale, and yet which does not even pass the title to the vendee. *Pinkam v. Mattox*, 53 N. H. 600; *Dodsley v. Varley*, 12

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Ad. & El. 632. So there may be a delivery such as puts an end to the right of stoppage *in transitu*, and yet no acceptance and receipt such as satisfies the statute of frauds. *Smith v. Hudson*, 6 Best & Sm. 431, 445. From the language of the statute of frauds it will be perceived that there must not only be an *actual receipt* of the goods, but there must also be an *acceptance*. This draws the question into the domain of *intent*; and the most cursory reading of the cases will show that the courts regard the question, whether there has been such an acceptance and actual receipt as satisfies the statute of frauds, as largely a question of intent. But the existence of the vendor's lien is not in an equal sense a question of intent; because, when a sale is made and executed, so as to pass title to the vendee, the vendor never intends to detain the goods, except in those cases where to do so is in accordance with the course of business which subsists between the parties (of which the books afford some instances), or unless such is the actual agreement; but in nearly all cases the intent is that the title shall pass, and that the vendee shall take the goods at his pleasure, and the corresponding expectation is that he will pay for them according to the terms of the contract. The vendor's lien is thus raised, not in pursuance of the intent of the parties, but by implication of law, in a state of things which the vendor, and presumptively the vendee, never intended nor expected. It is quite clear, therefore, that we cannot regard the test of delivery to satisfy the statute of frauds as a safe test by which to determine the existence, or non-existence, of the vendor's lien.

On the contrary, we affirm that, as between the vendor and vendee, laying out of view the rights of subsequent purchasers from the vendee, the vendor's lien is not divested by any species of *constructive delivery*, so long as he retains the *actual custody* of the goods, either by himself or by his own agent or servant. This

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doctrine is supported by the best English and American adjudications. In 1877, it was said by SIR BARNES PEACOCK, in giving the judgment of the English privy council, "to be clearly settled, that unless actual possession has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser in the event of his insolvency." *Grice v. Richardson*, 3 App. Cas. 319, 323. "There is," said SHAW, C. J., "manifestly a marked distinction between those cases which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price." *Arnold v. Delano*, 4 Cush (Mass.) 33, 38; quoted with approval in *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 406. To the same effect is *Newhall v. Vargas*, 15 Me. 314, 319. "The lien of the vendor," says MILLER, J., "always exists until he voluntarily and utterly resigns the possession of the goods sold, and all right to detain them. So long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount to a constructive delivery, so as to pass the title or avoid the statute,"—meaning the statute of frauds. *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 407. Speaking upon the same subject, it was said in a later Massachusetts case by Mr. Justice WELLS: "Regarding the sale and order for delivery as sufficient to make it effectual to pass title as between the parties, still until actual and full delivery, the seller is not deprived of his right to insist upon his lien for the price. Delivery to a carrier for transportation to the purchaser is sufficient to pass the title, and authorize the carrier to complete the delivery and make it absolute. But until so made absolute, the seller may revoke his authority and thus intercept the transmission, restore himself to

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possession, and retain his lien. The same principle applies in all cases of inchoate delivery, or whatever mode of transmission of possession. Until the delivery is actual and absolute, the seller may suspend it and revoke the authority of any intermediary to perfect it." *Keeler v. Goodwin*, 111 Mass. 490, 492. "The rule," said LOWRIE, C. J., "is that, so long as the vendor has actual possession of the goods, or as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances." It was, therefore, held that the rejection of evidence tending to show a constructive delivery under a contract of sale was unimportant, where the goods had not been removed after the sale, but continued in the stores and custody of the vendor until the published insolvency of the vendee. *White v. Welsh*, 38 Pa. St. 396, 420. Even where the goods were ponderous and lay by the road-side, and an agent of the vendor had pointed them out to the agent of the vendee for the purpose of delivery to him, and a minute of the transaction had been entered in the books of the vendor, charging the goods to the vendee,—it was held that this, although a complete delivery to transfer title to the vendee, did not cut off the vendor's lien upon the happening of the insolvency of the vendee, the goods remaining in the same position as when thus pointed out. *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 404.

So, the delivery of a bill of lading, warehouse receipt, bought and sold note, delivery order, sale ticket, carrier's receipt, or any other writing intended by the parties or made by commercial usage a symbol of the goods themselves, passes constructive possession to the vendee; and, yet, nothing is more clear than that as between the vendor and vendee themselves, and in many cases as between the vendor and a sub-vendee, the latter

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being a *bona fide* purchaser for a valuable consideration, such symbolical delivery does not divest the vendor's lien, provided the vendor remain in actual custody of the goods. Thus, where the goods are delivered to a carrier by the vendor for shipment to the vendee, the vendor, in the ordinary course of business, transmits the bill of lading to the vendee; but this, on the most familiar grounds, does not cut off the vendor's right of stoppage *in transitu*. In support of this statement of doctrine, we need not go further than refer to the decision of our supreme court, holding that where a sale is not made upon credit, although the goods contracted for have been set apart and identified in the store house of the vendor, and although they have been sold by the vendee to a sub-vendee, and a delivery order for them, given by the vendee to the sub-vendee, on the vendor, has been presented by the sub-vendee to the original vendor, and has been by him accepted in writing—yet, if the original vendee becomes insolvent, leaving the purchase price unpaid before the original vendor has actually parted with the goods, he may still exercise his right of lien upon them, notwithstanding the rights of the sub-vendee. In such case, the sub-vendee acquires no greater rights than his vendor, the original vendee. *Southwestern Freight, etc., Co. v. Plant*, 45 Mo. 517; denying *Whitehouse v. Frost*. 12 East, 614; re-affirming *Southwestern Freight Co. v. Stanard*, 44 Mo. 71; citing and approving *Miles v. Gorton*, 2 Cromp. & M. 504, and *Tanner v. Scovell*, 14 Mees. & W. 28. The terms of the sale, it is true, contemplated a cash payment, and this, as already pointed out, was a condition precedent to the right of the vendee to take the goods. But there can be no distinction in principle between the kind of possession which will support the vendor's lien *before it is waived*, and the kind of possession which will support it *after it has revived*.

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Let us next apply these principles to the salient facts of the present case, and look more closely to see how the judicial decisions have characterized those facts.

The contract already set out required the whiskey to be invoiced, when made, to C. Conrad & Co.; and this, as already stated, was accordingly done. But it has been held that the lien of the vendor is not destroyed by invoicing the goods to the purchaser. *Miles v. Gorton*, 2 Cromp. & M. 504; *Dixon v. Yates*, 5 Barn. & Ad. 313. The superior court of the city of New York—a court, it may be stated, which has always stood high upon commercial questions,—has gone further than this, and has held, in an able and well considered opinion by CHARLES F. DALY, J., that the delivery of a bill of parcels of the goods sold, by the vendor to the vendee, does not affect the vendor's lien as to so much of the goods as remain in his possession, even as against a sub-vendee. *Hamburger v. Rodman*, 9 Daly (N. Y.) 93. The court were so well assured of the grounds upon which they decided this case that they refused to grant an appeal from their decision. We may, therefore, dismiss from further view the fact that the goods were invoiced to Conrad, and that bills of parcels, with gauger's certificates, were delivered to him.

This contract also required the goods to be marked with the name of C. Conrad & Co. as distillers, the brands to be furnished by Stagg, Hume & Co.; and the barrels were so branded. But it has been held, where the subject of the sale was rum in puncheons, which lay in the warehouse of a third person, where they had been deposited by the original vendor, that the act of a sub-vendee, with the consent of the warehouseman, in marking the initials of the sub-vendee upon them, in gauging them, and even in coopering them, did not amount to a taking possession such as divested the original vendor's lien,—though it was conceded that

taking samples and coopering were circumstances from which a jury might infer an actual delivery of the whole. *Dixon v. Yates*, 5 Barn. & Ad. 313.

This contract provided that the goods should be stored in United States Warehouse Number 541, of the eastern district of Kentucky, and that storage should be charged at the rate of five cents per barrel per month from the date of entry, that is, that storage should be charged by Stagg, Hume & Co. against C. Conrad & Co. But while there is some discredited authority—all of it more than fifty years old—to the effect that the vendor's lien is discharged so that it will not revive on the insolvency of the vendee, by his agreeing to hold the goods as warehouseman for the vendee (*Hurry v. Mangles*, 1 Camp. 452; *Barrett v. Goddard*, 3 Mason [U. S.] 107; *Chapman v. Searle*, 3 Pick. [Mass.] 38), yet the more recent and better view is that the vendor's lien is not destroyed by an agreement between the vendor and the vendee, that the goods shall remain in the warehouse of the vendor, subject to the payment of warehouse rent by the vendee. *Grice v. Richardson*, 3 App. Cas. 319; *Miles v. Gorton*, 2 Cromp. & M. 504; s. c., 4 Tyrwh. 295. So it has been held, that, where a *part* of the goods are taken way by the vendee, and warehouse rent paid in respect of such part, this will not prevent the exercise of the right of the vendor's lien upon the remainder. In such a case, it was ruled that the charge of warehouse rent by the vendor did not constitute such a delivery as to divest his lien. *Winks v. Hassell*, 9 Barn. & Cres. 373. See, also, *Bloxam v. Sanders*, 4 Barn. & Cres. 941. This is somewhat analogous to a ruling of our supreme court under the statute of frauds, where a contract was made for the sale of cattle in the field of the vendor. The purchaser told the vendor to keep the cattle and feed them at the purchaser's expense until he should send for them. This the vendor agreed to do, but upon the condition

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that, if any of them died, the purchaser should bear the loss; to which the purchaser assented. It was held that this was no delivery to take the contract out of the statute of frauds. *Kirby v. Johnson*, 22 Mo. 354. Nor in such a case will the fact that the vendor gives to the vendee a *delivery order*, reciting that the vendor holds the goods to the order of the vendee rent free, until a date named, be such a delivery as to divest the vendor's lien. *Townley v. Crump*, 4 Ad. & El. 58.

Concerning the decisions which assert the opposing view, it should be said that the earliest of them, *Hurry v. Mangles*, 1 Camp. 452, was a *nisi prius* decision of Lord ELLENBOROUGH; and it need scarcely be said that a *nisi prius* decision by a judge, however eminent, must have little weight, where the same question has been subsequently ruled otherwise in the same jurisdiction by a court *in banc.* The second of those cases, *Barrett v. Goddard*, 3 Mason (U. S.) 107, was likewise a *nisi prius* decision of Mr. Justice STORY at circuit. That judge was an eminent commentator, more noted for the exuberance of his learning than for the soundness of his judgment or the accuracy of his statement. His opinion in the case referred to is a singular confusion of the three subjects of delivery to pass title as between vendor and vendee at common law; of delivery to satisfy the statute of frauds; and of delivery to divest the vendor's lien or cut off the right of stoppage *in transitu.* It was denied in England, in *Townley v. Crump*, 4 Ad. & El. 58. It was severely criticised in Pennsylvania by LOWRIE, C. J., in *White v. Welsh*, 38 Pa. St. 396, 421. It was denied in the New York court of common pleas, in *Hamburger v. Rodman*, 9 Daly (N. Y.) 93, 98; and it was finally denied in the same circuit where it was pronounced, on the authority of *Arnold v. Delano*, 4 Cush. (Mass.) 33,—Mr. District Judge LOWELL saying: "I take the modern doctrine to be that, if the buyer stops payment before the seller has

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actually parted with possession, though after he has parted with his title, if no rights of innocent third persons have intervened, his lien revives." *Parker v. Byrnes*, 1 Lowell (U. S.) 539, 540. The third case, *Chapman v. Searle*, 3 Pick. (Mass.) 38, though not overruled in terms, has been overruled in principle by the subsequent case of *Arnold v. Delano*, 4 Cush. (Mass.) 33, and by subsequent cases in the same jurisdiction, which assert that the vendor's lien is not gone so long as he retains actual possession.

In determining whether a contract of sale has been executed so as to pass title to the goods, or whether there has been a delivery such as satisfies the statute of frauds, the courts frequently appeal to a principle thus stated by Mr. Chitty: "Although the contract for a sale of goods be complete and binding in other respects, the property in them remains in the vendor and at his risk, if a material fact remains to be done before the delivery, either to distinguish the goods, or ascertain the price thereof." Chitty on Contracts, 375, as quoted in *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 71, 83. But this is not a conclusive inference. It is rather in the nature of a *prima facie* presumption, which may be rebutted by circumstances. For instance, the title may pass, although marking, weighing or measuring is thereafter to be performed, in order to ascertain the amount to be paid. *Ober v. Carson*, 62 Mo. 209, 213; *Thompson v. Baltimore, etc., Railroad*, 28 Md. 396, 404; *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 71, 83. "Presumptively," says COOLEY, C. J., "the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to be controverted." *Byles v. Colier*, 54 Mich. 1, 5. Moreover, the case where such a presumption arises is to be

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distinguished from the case where there has been such a delivery as would authorize a jury to find that the parties intended that title should pass, and yet where the goods were left in the hands of the vendor to be the subject of some further treatment,—as where a piano sold to the vendee was left in the vendor's shop to be finished in a certain way. *Thorndyke v. Bath*, 114 Mass. 116.

By analogy, the courts have appealed to a similar principle for the purpose of determining whether there has been such an actual delivery as cuts off the right of stoppage *in transitu*, or divests the vendor of his lien. Thus, a broker effected a sale of thirty tons of rosin, and notified his principal as follows: "I have this day sold to David Bromer thirty tons of London-made rosin, more or less, at 13*s*. per cwt., lying in mats at the wharf of Lys & Co., payment by a bill at six months," —signed by the broker. Still later the plaintiffs (the vendors) sent an order to the wharfingers to weigh and deliver the rosin; upon which the latter gave notice to the vendee that they had received such order from the vendors. Shortly afterwards the vendee became insolvent, and, the rosin still lying at the wharf, the vendors gave the wharfinger notice not to deliver it. It was held that the property had not vested in the vendee, the decision proceeding upon the principle, "that the order sent by the vendor to the wharfinger, to deliver the goods, is sufficient to pass title to the vendee, provided nothing remains to be done but to make the delivery. If it be necessary by the terms of the contract, or by the order to the wharfinger, that anything should be done previous to the delivery, the transfer is not complete till *that thing* be done. It is impossible to say, in the present case, that something was not to be done. The order was to weigh and deliver; that act, therefore, which was to precede delivery, not having taken place, the property did not pass to Bromer." *Withers v. Lys*,

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1. Holt. N. P. 18, opinion by GIBBS, C. J. It is perceived that, although the judge who decided this case placed his decision upon the ground that the right of property had not passed, the same reasons would have resulted in the conclusion that the vendor had not parted with his possession in a manner so entire as to cut off his lien.

A case was found in one of the legal periodicals where this principle was directly applied in solving the question whether a vendor had lost his right of lien. The decision was made by three referees, all of them eminent in the legal profession. Hon. WILLIAM F. ALLEN, subsequently a judge of the New York court of appeals; Hon. JOSEPH F. BOSWORTH, subsequently a judge of the superior court of the city of New York; and Hon. THEODORE W. DWIGHT, president of the law faculty of Columbia College, and sometime a judge of the New York commission of appeals. These referees delivered an opinion of exceptional ability, in which, on the facts before them, they resolved that the following propositions were established by the authorities: "Where the goods, at the time the contract of sale is made, though in the legal custody and control, are not in the actual possession of the vendor, but are so situated that the purchaser cannot obtain actual possession until a specific act is done by the vendor, if the vendee becomes insolvent before this act has been done, and the actual possession of the goods has not been changed, the vendor may detain the goods as security for the payment of the contract price, and, as a consequence, will not be compelled by a court of equity to perform the act in question. The right of detention, in case of the intervening insolvency of the vendee, may be exercised by the vendor, so long as the vendee has neither obtained actual possession, nor been furnished by the vendor with the exclusive means and power of controling the possession." *Gill v. Pavenstedt*, 7 Am. Law. Reg. (N. S.) 672, 676.

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The facts in this case sustain a considerable analogy to the facts of the case now before us. A. had purchased a quantity of teas from B. The goods were placed in the bonded warehouse of a third person, and were there entered in the name of B., the vendor. The sale was upon a credit, at a specified price, and the duties were to be paid by the vendee as a part of the price. He had withdrawn, by permission of the vendor, portions of the goods at different times, paying the duties on such portions. Before the credit expired, the vendor gave to him an order on the bonded warehouse, directing the latter to transfer the residue of the goods to the name of the vendee, which was accordingly done. But, as between the parties and the government, the goods still remained in the name of the vendor, and could not be withdrawn from the warehouse under the regulations of the treasury department, except by what is termed a "withdrawal entry" signed by the vendor, or by some one authorized by him in writing. While the goods were in this condition, the vendee became insolvent. After his insolvency, he demanded that the vendor should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price. It was held that an act, to-wit, the signing of the withdrawal entry by the vendor, remained to be done, as between himself and the vendee, which was of such a nature that there was no delivery, either actual or constructive, and that the vendor's lien for the unpaid purchase money subsisted. *Gill v. Pavenstedt*, *supra.* We assume that, under the internal revenue statutes above set out, the withdrawal entry, in the case before us, could only be made by the distilling company in whose name the deposit entry was made; and this, as already shown, was—not C. Conrad & Co., simply, but "*The Silver Creek Distilling Company*, doing business as C. Conrad & Co."

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In a case still more like the present, which turned upon this principle, certain distilled whiskey was stored in a government warehouse in Terre Haute, under the provisions of the internal revenue laws, in the name of the vendor, who paid the insurance thereon, and who sold the whiskey, so stored, to the vendee on a credit, and caused it to be inspected and gauged, as is required by the internal revenue laws; whereupon the government store-keeper certified that the whiskey was in the store house, "Mr. Edward Dewey, of Boston (the vendee) being the owner of said whiskey, as per Messrs. Mohr & Solomon's (the vendor's) order." It was a part of the contract of sale that the vendor should, from time to time as the vendee should request, ship the goods from the bonded warehouse and pay the warehouse charges, taxes, stamps and insurance, drawing on the vendee at ten days' sight for the amounts so paid. Down to this point, it is perceived that the whiskey was similarly situated to the whiskey in the case before us. It was, as here, in a government warehouse. The title, as here, had been transferred from the vendor to the vendee. The government warehouseman had attorned, so to speak, to the vendee, by issuing the certificates recognizing the vendee as the owner; and yet it was held that, drafts drawn against a shipment of the whiskey having been protested, these facts did not determine the vendor's right of stoppage *in transitu*, but that the vendors might stop them and maintain replevin for them, while they were yet in the hands of the carrier in Boston. The court, speaking through Mr. Justice MORTON, said: "Something remained to be done by the vendors under the contract of sale, before the goods would come into the possession of the vendee at the place of destination. The contract contemplated that they were to forward them to Boston. If the goods had been and remained in their actual possession as vendors until they forwarded them, on the

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order of Dewey, their right of stoppage *in transitu* would have been unquestionable. The result is the same, though they remained stored in a government warehouse, unless the transfer to Dewey on the records of the warehouse is to be treated as a termination of the transit. But, as we have seen, the terms of the sale provided that the plaintiffs should forward the goods to Boston as their place of destination, and the storage in the warehouse was preliminary to their transit, and not the termination of it. It is no answer to this view to say that there was a constructive delivery of the whiskey to Dewey, which vested the property in him, and that he had the right to take possession of it and withdraw it from the warehouse." *Mohr v. Boston, etc., Railroad*, 106 Mass. 67, 71.

If this conclusion was a sound one,—and, in favor of the strong equity upon which the vendor's right of lien subsists, we do not see why it was not,—it seems, when applied to the contract in evidence in this case, decisive of the existence of the vendor's lien, unless we are to hold that a vendor has a better right of detainer *after* the goods leave his warehouse and get into the hands of a carrier, than while they are yet in his warehouse.

Let us next inquire how this principle applies to the contract before us. It stipulated for the doing of three things by the vendor before the delivery should be complete. These were: (1) To give care and attention to the packages while in the government warehouse: "That all care and attention shall be given the packages while in store, by the party of the first part." (2) To place insurance upon the property, if so required by the vendee: "That the party of the first part, if desired to do so by the party of the second part, shall place insurance, loss, if any, payable to the party of the second part, who shall pay the premium at not to exceed current rates." (3) And, finally, to complete the delivery of the property itself: "That, upon

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release from bond and payment of United States and state taxes and storage, by the party of the second part, the packages shall be delivered, free of charges, by the party of the first part, on board the cars at Silver Creek, Kentucky." Presumptively, there had been no actual delivery of the property to the vendee until the last of these three things was performed, unless the other circumstances surrounding the transaction were such as to repel the presumption. Whether they were was a question of fact, which has been resolved against the plaintiffs by the trier of the facts, and his resolution is conclusive upon us.

It has been argued with much force that this last quoted clause of the contract, requiring the delivery of the goods free on board at Silver Creek, is to be regarded, when considered in the light of the facts of the case, as merely a contract to perform an additional service in respect of the property after delivery had in fact taken place. We do not say that the trial court might not have so regarded it. The case of *Cooper v. Bill*, 3 Hurl. & Colt. 721, required the subject of the sale (certain unsquared logs of timber) "to be delivered to boats when required." They were taken to the side of the canal and deposited on the bank near the landing, but not near enough to the boats, it would seem, to satisfy the requirement of the contract. While so deposited, the vendee, by his agents, took actual possession, marked the logs with his initials and expended five pounds in squaring them. It was held that there had been here such a delivery as divested the vendor of his right of lien. Although the case was very badly considered, so badly that it would seem that two of the judges had not in their minds any sound conception as to the nature of the vendor's lien,—yet the conclusion was obviously right, on the analogy of the rule in the law of stoppage *in transitu*,—that the vendee may intercept the transit and take possession before the

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goods have arrived at the place appointed for delivery, which possession will end the right of stoppage of the vendor. If the removal of the whiskey in this case from the distillery to the bonded warehouse and thence to the cars, which the evidence shows would come to a side track by the side of the warehouse, could be regarded as a transit, and if it had appeared that C. Conrad & Co. had, by themselves or agents, intercepted the transit and taken actual possession of the whiskey while it was in the bonded warehouse,—this, of course, would have put an end to the vendor's lien, notwithstanding the provision of the contract requiring the vendors to deliver the goods free on board the cars. But no such facts appear in the record,—unless the collection of facts that the distillery was run in the name of C. Conrad & Co, that the warehouse had above its door the same name, that the whiskey was branded in the same name, and that the correspondence to and fro between Silver Creek, Kentucky, and St. Louis, was sometimes conducted as though the warehouse was actually that of C. Conrad & Co.,—were facts from which the trial court was conclusively bound to find an actual delivery of the whiskey to C. Conrad & Co. But to hold, as a conclusion of law, that the facts prove such a delivery, would make them prove too much; because it would make them prove that C. Conrad & Co. were the distillers, in contradiction of the contract under which the whiskey was made, which provided that Stagg, Hume & Co. should make the whiskey, and that, although they should use the name of C. Conrad & Co. as distillers, they should exonerate C. Conrad & Co. from all liability to the government for the conduct of the distillery. It would also involve the absurdity of holding that, while the warehouse was that of C. Conrad & Co., yet they were under obligations by the terms of the contract to pay storage for keeping their whiskey in it to Stagg, Hume & Co. In fact, it would turn the

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whole transaction upside down, divest the parties of the character of vendor and vendee and turn them into the relation of principal and agent: C. Conrad & Co. being the principals and proprietors, and Stagg, Hume & Co. being merely their agents. Thus, if we do not ignore the language of the contract, throw it away, and get it entirely out of sight, we must, in order to uphold this contention, turn the whole transaction into elemental nonsense.

The question has been presented in another aspect by the very able argument which has been made on behalf of the plaintiffs. The contention is this: That where the goods which have been sold are deposited in the warehouse of a third person, to the use of the vendee, there has been a delivery such as cuts off the vendor's lien, under the English law, where there has been an *attornment* by the warehouseman to the vendee, and, under the American law, without such attornment; that the goods in this case were warehoused with a third party, which third party was either the government store-keeper, who had the keys and the actual possession of the warehouse, or else the Silver Creek Distilling Company, which was the owner of the warehouse; and that, by thus being placed in the warehouse of a third party, they were placed under the dominion and control of the vendee, so far as could be done while the government tax remained unpaid, which divested the possession of the vendors and with it their lien. We shall consider this question in the alternative aspect of the government store-keeper being the warehouseman, and of the Silver Creek Distilling Company being the warehouseman.

In the first aspect of the question, it is to observed that the effect of depositing goods in the custom house, or in a bonded warehouse, to secure the payment of government fees, has been several times considered by the courts in respect of a question which is strictly

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analogous to the question of delivery to divest the vendor's lien, namely, the question whether, after goods have arrived at the end of a voyage, there has been such an actual delivery to the consignee as cuts off the right of stoppage *in transitu*; and it has been uniformly held that the fact of a deposit of the goods in a government warehouse does not determine the right. *Northey v. Field*, 2 Esp. 613; *Donath v. Broomhead*, 7 Pa. St. 301; *Harris v. Pratt*, 17 N. Y. 249; *Mottram v. Heyer*, 5 Denio, (N. Y.) 629. And it is well known that in such cases the consignor has generally nothing further to do, in order to get the goods out of the warehouse and into the actual possession of the consignee. The consignee really enters the goods at the custom house, as was done by his assignee in the case of *Harris v. Pratt*, *supra*. No strength, therefore, can be derived in favor of the hypothesis of the plaintiffs, from the fact that these goods were in the possession of the government store-keeper. It is to be observed that the government store-keeper is not a warehouseman for any purpose of commerce. He simply holds the goods in the course of transmission, so to speak, between the manufacturer and the consumer, until the government dues are paid. His position ought not to be construed so as to interrupt or impair the rights of vendor, vendee or pledgee, beyond what the terms of the statute under which he holds possession absolutely require. The language of Judge WAGNER in *Ober v. Carson*, 62 Mo. 209, 215, fully justifies us in this conclusion.

But a further argument has been pressed upon us, in favor of the plaintiffs, upon the sections of the federal statute, already quoted, which imply that the store-keeper, on the order of the collector, upon the payment of the government dues, is to deliver the goods to the *owner;* and, as it is not disputed that Conrad was the owner, the argument derived from this is that the government store-keeper held the goods in a sense as his bailee,

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to be delivered to him or to his assignee upon the payment of the dues. This argument, like other arguments which have been pressed upon us in this case, proves too much for the case of these plaintiffs. We have already shown that, assuming the warehouse receipts which were delivered to them to be effective to make a symbolical delivery of the goods to them, yet this, under the evidence, did not make them the *owners*, but it merely made them *pledgees*. The well-known distinction between a pledge and a chattel mortgage is that in a chattel mortgage the title passes to the mortgagee, subject to a defeasance; while, in the case of a pledge, the title does not pass to the pledgee, but remains in the pledgor, but the possession passes to the pledgee for the purpose of securing the performance of the obligation intended by the parties. A pledgee, therefore, is not the owner, but the mere holder of a possessory lien. If this argument were a sound one, then these pledgees would not have had the right, in the event of an attempt upon the part of the pledgor to repudiate the pledge, to pay the taxes and take the goods out of the government storehouse. But such a pledge would be utterly ineffective and nugatory, unless the pledgees were accorded this right, and they could not be accorded this right without being regarded as the "owners" within the intendment of the statute. We hold that congress, in employing the word "owners," made use of a general word to avoid circumlocution and needless specification, and that this general word was a word of description, intended to designate any person who, upon the payment of the government dues, was in law entitled to the possession of the goods. When, in the cases before us, the sheriff in Kentucky levied upon these goods in the hands of the government store-keeper, and thereafter paid the taxes, they were properly delivered to him as the owner, within the intendment of the statute. And yet he was not the owner in the sense in which that word is ordinarily

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employed, though he had the title for a limited and qualified purpose.

But if the Silver Creek Distilling Company is to be regarded as the warehouseman, then the conclusion is the same. The circuit court does not seem to have found, as a fact, what was the relation subsisting between the Silver Creek Distilling Company and Stagg, Hume & Co. Perhaps on the evidence either of the following conclusions was warrantable: (1) That the Silver Creek Distilling Company was the mere agent or servant of Stagg, Hume & Co. for the purpose of carrying out the contract subsisting between them and C. Conrad & Co.; or (2) that, in making this contract with C. Conrad & Co., Stagg, Hume & Co. were agents acting for an undisclosed principal, and that the Silver Creek Distilling Company was that principal. We do not see that it makes any difference in principle which of these views is taken. The fact remains that there was a substantial identity between Stagg, Hume & Co. and the Silver Creek Distilling Company, and that there was no privity between the Silver Creek Distilling Company and C. Conrad & Co. It does not appear that any letter was ever addressed by the Silver Creek Distilling Company to Conrad as such, or by him to them, and it is not clear from the record that he even knew of the existence of such a corporation. They were the mere fingers of Stagg, Hume & Co. to carry out their contract with C. Conrad & Co., or else Stagg, Hume & Co. were their mere agents to make the contract without disclosing them; and it does not seem to matter which, for the purposes of the question we are considering. If the Silver Creek Distilling Company were the real principals in the contract, then the case is that of the vendor holding the goods in his own warehouse. If they were the mere agents of Stagg, Hume & Co., then the case is that of Stagg, Hume & Co. holding the goods in the warehouse of their agent; for what a man does by his agent he does by himself.

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In either case the possession was the possession of the vendor, and carried with it a vendor's lien. That the circuit court has taken this view is shown by the follow-instruction, given of its own motion:

"If the court finds from the evidence that the contract of October 25, 1882, between Stagg, Hume & Co. and Charles W. Conrad, admitted to evidence, was entered into by Stagg, Hume & Co., and that the whiskey in controversy was made under said contract at the instance and request of Stagg, Hume & Co. by the Silver Creek Distilling Company, and placed by it in its bonded warehouse at Silver Creek under said contract, and that Charles W. Conrad failed and suspended business in January, 1883, and that at the time of such failure Stagg, Hume & Co., or the Silver Creek Distilling Company, jointly with the store-keeper for the United States, were in actual possession of the said whiskey in the said bonded warehouse; and that the notes given by Charles W. Conrad, in settlement for the said whiskey, are now, and have always been, held by Stagg, Hume & Co.,—then, the court declares, as a matter of law, that, at the time of said Conrad's failure and suspension of business, the said Stagg, Hume & Co. had a vendor's lien on said whiskey and a right to retain possession thereof, either themselves or by or through said distilling company, until they were paid therefor; provided, the court further finds from the evidence that, at the time the warehouse receipts for the whiskey in controversy were issued to plaintiffs, Charles W. Conrad was, in fact, insolvent, and, further, that neither the distilling company, for itself or on behalf of Stagg, Hume & Co., nor Stagg, Hume & Co., after they, or either of them, became aware of such insolvency, did, with full knowledge of the circumstances under which said receipts were issued, ratify their issuance to Charles W. Conrad."

IV. We come now to the question of the effect of the symbolical delivery of the property to the plaintiffs

as determining the vendor's lien. For the purposes of making more clear the view which we take, we shall assume that the evidence establishes that Stagg, Hume & Co. authorized Conrad to issue warehouse receipts in respect of the whiskey on store in the government warehouse number 541, at Silver Creek, Kentucky. Whether the Silver Creek Distilling Company, as such, ever sanctioned the issue of such warehouse receipts, it is not material to inquire; since, as we have already stated, there was no privity of contract between that corporation and Conrad. If Stagg, Hume & Co. gave the authorization, it concluded them, if they were the real vendors; and it equally concluded the distilling company for which they were the agents, if the distilling company were the real vendors.

We ought, perhaps, to state here that we do not take the view upon which the circuit court proceeded, and which is embodied in the above instruction, that the symbolical delivery, which was attempted or effected by means of these warehouse receipts, became inoperative from the circumstance that, at the time of their issue, Charles W. Conrad was in fact insolvent. We can find no such principle in the cases which expound the nature of the vendor's lien and the analogous right of stoppage *in transitu.* Neither of these rights is of such a nature as to be self-executing. It is a right which the vendor may or may not assert; and if he does not assert it in time it is lost. Stagg, Hume & Co. had not asserted it when these warehouse receipts were issued, and they could not thereafter assert it as against the holders of these warehouse receipts, provided the law placed them, in respect of the rights thereby acquired, on a better footing than that which was occupied by their transferors, C. Conrad & Co.

The general rule of the common law touching transfers of personal property is that the transferee acquires no better title than the transferor had; if the vendor had

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no title, the vendee gets none; if the pledgor had no title, the pledgee gets none; if the vendor or pledgor had a title, but subject to a lien in behalf of another person, the vendee or pledgee takes it burdened with such lien. This is unquestionably the general rule; but the rule has its exceptions. One exception known to the English common law is the well-known case of sales in market overt; but this exception is a stranger to American law, because in this country there are no markets overt. Another exception, founded in the custom of merchants, arises in the case of strictly negotiable paper, whereby the transferee of a bill of exchange or negotiable promissory note, who receives it in due course of trade, for a valuable consideration, before maturity, and without notice of any infirmities attaching to it, takes it discharged of any equities which may exist in respect of it between the original parties to it. Another exception, founded also in the custom of trade and analogous to the exception relating to commercial paper, relates to the symbolical delivery of goods in the hands of a carrier, effected by a transfer of the bill of lading. Still another exception, having its foundation, in this country, in the general usages of trade, of which the court stake judicial notice (*Gibson v. Stevens*, 8 How. (U. S.) 384, 399), but confirmed in nearly all the states of the union by statutes, relates to symbolical transfers of personal properly in warehouses, by the transfer of warehouse receipts. Following the precedent set by the great case of *Lickbarrow v. Mason*, (2 T. R. 63; s. c., 1 Smith Lead. Cas. 388), it is now the recognized law of this country that the owner of goods, or one having the legal right to sell or to pledge them, may invest another with the full title and constructive possession of them, by transferring to him a bill of lading or a warehouse receipt which has been issued as their symbolical representative, either by a carrier or a warehouseman in whose custody they are, so as to discharge the vendor's

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lien or his right of stoppage *in transitu*, if the transferee of the bill of lading or warehouse receipt receives it *bona fide* and *for a valuable consideration*.

But what is to be deemed a valuable consideration, within the meaning of this rule, is one in respect of which the decisions are in a very unsatisfactory state. The question, whether one who takes an assignment of such a symbol of property, merely as collateral security for a past indebtedness, without making any present advance, agreeing expressly or impliedly for an extension of time to the transferor, or foregoing any benefit or advantage, is to be regarded as a purchaser for value within the meaning of this rule, is the one which we have now to decide; and it is a question upon which there is no direct authority in this state. Unfortunately, the authorities in respect of it in other jurisdictions are conflicting. The question has, within a comparatively short period, been decided both ways in England.

In *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393 (*anno* 1869), it was held by three judges, on an appeal from a colonial court, that one who takes a bill of lading merely as collateral security for a previous obligation, is not a purchaser for a valuable consideration in the sense which cuts off the vendor's lien. "Doubtless," said SIR JOSEPH NAPIER, in giving the opinion of the court, "the vendor's claim cannot prevail against the claim of a transferee for value, given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it, as already stated; *cessante ratione, cessat ipsa lex*. Where there is no advance made or value given upon the faith of the documents; where the object is simply, by a sweeping clause, to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent, for an improvident advance made upon the faith of a totally different security; where,

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upon the true construction of the assignment, no interest passed that would place the assignee in a better position that the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment and without other consideration whatsoever—it appears to their lordships that such a transfer, so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim." It is to be observed, however, that the case did not present the naked question we are here considering; since the assignee of the bills of lading knew that the assignment was made in contemplation of insolvency, and this, under a recent decision of our supreme court, would have deprived him of the position of a *bona fide* purchaser without notice. *Young v. Kellar*, 94 Mo. 581.

The question came before the English court of appeals, not long afterwards, in the case of *Leask v. Scott*, 2 Q. B. Div. 376, in which case the doctrine of the case last cited was denied, in an earnest and somewhat heated opinion by the Lord Justice BRAMWELL, who declared that the decision was "not only a novelty, but a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject." In other words, he inferred that it was the law that one who takes a bill of lading as collateral security merely for an antecedent indebtedness is a purchaser for a valuable consideration, and takes it discharged of the vendor's right of stoppage *in transitu*—simply because the question had never before been decided in England one way or the other. As in the previous case, it is to be observed with reference to this case, that the record did not present the naked question; for there was a present consideration mingling with the antecedent indebtedness, so that the observations of the court upon the question, notwithstanding the positive terms in which they were

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couched, were really no more than *obiter dicta*,—an opinion upon a case not before them.

In the federal courts we find but two direct decisions upon the question. In *Lessassier v. The Southwestern*, 2 Woods (U. S.) 35, 36, Mr. Justice BRADLEY at circuit ruled the following proposition: "A transfer of a bill of lading as a mere collateral for previous obligations, without anything advanced, given or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu.*" The contrary was held by Mr. District Judge NELSON, in the federal circuit court in Minnesota, by analogy to the rule laid down by the supreme court of the United States, in *Railroad v. National Bank*, 102 U. S. 14, in respect of commercial paper. *St. Paul Roller Mill. Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434.

We do not find that the question has been distinctly decided in any of the state courts, except in the case of *Loeb v. Peters*, 63 Ala. 243; s. c., 35 Am. Rep. 17, where it was held that the transfer of a bill of lading by the consignee to his prior creditor, as collateral security merely for the prior indebtedness, does not cut off the vendor's right of stoppage *in transitu*—the creditor of the vendee in such a case not being a *bona fide* purchaser for value.

In the absence of any direct authority which is controlling upon us, we are thus under the necessity of deciding the question according to the best *analogies* we can discover in the decisions in this state and in other jurisdictions. There are four analogies which bear directly upon the question: (1) The analogy of goods purchased by means of fraudulent representations, such as will authorize the vendor, on discovering the fraud, to rescind the sale and reclaim the goods. (2) The analogy of conveyances of lands and goods

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made with the design to hinder, delay or defraud creditors, the purchaser or transferee being innocent of knowledge of the fraudulent design. (3) The analogy of other conveyances of land, subject to unrecorded liens or equities unknown to the transferee. (4) The analogy of the transfer of commercial paper.

First. In respect to the first analogy, it has been unanimously held in the court of appeals of New York, in a case twice argued, that one to whom personal property has been delivered by a fraudulent vendor *in payment* of a precedent debt due him, or (what is tantamount thereto) in performance of an executory contract of sale, made by such fraudulent vendee prior to acquiring possession of the property, or of any symbolical representative of it, is not a *bona fide* purchaser for value, and cannot hold the property against the original defrauded vendor. *Barnard v. Campbell*, 55 N. Y. 456, s. c., on re-argument, 58 N.Y.73. It is to be observed that this case follows the analogies of the rulings in that state in respect of commercial paper, considered further on, under which a transfer even *in payment* of an antecedent indebtedness, does not divest equities subsisting in favor of the payor; which is not the law in this state. *Green v. Kennedy*, 6 Mo. App. 577.

Second. The analogy, in respect of conveyances of lands or goods in fraud of the creditors of the transferor, is illustrated by numerous decisions; and, so far as the writer has observed, they are all to the same general effect, which is that, to entitle the transferee to be treated as a purchaser for a valuable consideration, it must appear that he actually paid the purchase money before he had any notice of the fraud; it is not sufficient that he had agreed to pay it, or even that he had given his check in payment, unless the check had been paid. *Arnolt v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528; *Young v. Kellar*, 94 Mo. 581;

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McNichols v. Rubleman, 18 Mo. App. 515, 522. The decisions in other jurisdictions to the same effect are so numerous that we refrain from citing them.

Third. In respect of the third analogy, that of other conveyance of land, subject, in the hands of the grantor, to prior unrecorded conveyances, vendor's liens, resulting trusts or other secret equities,—our law, in like manner, speaks only in one way. In order to entitle the innocent grantee to protection against a prior unrecorded conveyance, vendor's lien or other equity, he must have parted with something of value as a consideration, before receiving notice of the prior conveyance of equity. *Aubuchon v. Bender*, 44 Mo. 560; *Halsa v. Halsa*, 8 Mo. 303; *Chouteau v. Burlando*, 20 Mo. 482; *Paul v. Fulton*, 25 Mo. 156; *Digby v. Jones*, 67 Mo. 107.

Professor Pomeroy, in his great work on equity jurisprudence, generalizing on this question, says: "A conveyance of real or personal property, as security for an antecedent debt, does not, upon principle, render the transferee a *bona fide* purchaser; since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of *bona fide* purchase." 2 Pom. Eq. Jur., sec. 749. To this last statement the learned commentator cites a long list of judicial authorities, pointing out, at the same time, that there are some holdings to the contrary. Since real property has in modern times entered largely into the operations of commerce, it is not perceived why there should be upon such a subject one rule for real property and another rule for personal property; nor is it perceived why there should be one rule for negotiable choses in action and another rule for tangible goods; and while it is desirable that the decisions of the state

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courts upon questions of commerce, and especially upon questions of commercial paper, should follow those of the federal courts, yet the state judicatories are not bound by the federal judicatories on these questions, and it could easily be pointed out that, on this particular question, so far as it concerns negotiable paper, a majority of the state courts deny the doctrine recently declared in the supreme court of the United States in *Railroad v. National Bank*, 102 U. S. 14.

Fourth. Proceeding now to the last and most direct analogy to the question before us, that of the transfer of commercial paper, we regret to find that the question whether the transferee of such paper, who takes it merely as collateral security for an antecedent indebtedness, acquires title to it discharged of prior equities, —is settled differently in different American jurisdictions, and does not seem to be settled at all in this state. The decision of the supreme court of the United States in *Swift v. Tyson*, 16 Pet. (U. S.) 1, is generally quoted as the leading case in favor of the position that such a taker of negotiable paper takes it discharged of equities. That case did not, however, decide the question; since the question in judgment was whether one who thus takes negotiable paper, *in payment*, takes it discharged of equities; although there is a *dictum* of Mr. Justice STORY, who gave the judgment of the court, that the rule would be the same in case it were taken as security merely for an antecedent indebtedness. Mr. Justice CATRON regarded this *dictum* as so objectionable that he made it the subject of a special dissent. The question remained *undecided* in that tribunal as late as the case of *Oates v. National Bank*, 100 U. S. 239, 249, where it was expressly left as an open question; but soon afterwards, in the case of *Railroad v. National Bank*, 102 U. S. 14, 25, it was resolved in favor of the dictum of Mr. Justice STORY, and contrary to the holdings of the courts of New York and many other states

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The opposing lines of American authority on this question appear to commence with the leading case of *Coddington v. Bay*, 20 Johns. [N. Y.] 637, where it was held by the highest court of that state, reversing a decision of Chancellor KENT (*Bay v. Coddington*, 5 Johns. Ch. 54), that one, who takes a negotiable instrument merely as collateral security for an antecedent indebtedness due to him from the person endorsing it to him, takes it subject to any equities which may exist between the original parties in respect of it. The same court, out of deference to the later decision of the supreme court of the United States in *Swift v. Tyson*, *supra*, again went over the whole ground, reviewing many authorities, and, while conceding the desirability of the state courts following the ruling of the higher federal tribunals on commercial questions, declined to recede from its previous holdings, but re-affirmed the following proposition: An innocent holder of negotiable paper, who has received it in the usual course of trade, for a valuable consideration, though from a person having no title and no authority to transfer it, will be protected, even as against the claim of the previous owner; but if it appear that the paper was received merely as collateral security for an antecedent debt, due from the person who made the unauthorized transfer, and that the transferee neither parted with value on the credit of receiving it, nor relinquished any previous security, he will not be deemed a purchaser for value and will not acquire a title to the paper as against the real owner. *Stalker v. McDonald*, 6 Hill [N. Y.] 93, 96. It would not be profitable, in a judicial opinion, to follow through the rulings of the different states the two divergent lines of authority thus started. We shall limit our inquiry to the law of Missouri and the law of Kentucky.

The initial case in this state is *Goodman v. Simonds*, 19 Mo. 106. In that case our supreme court had a case

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before it which, in its judgment, called for a decision of this question. The court, citing the New York decisions above given, and also citing, but not following, *Swift v. Tyson, supra*, ruled that the transferee of commercial paper as collateral security for an antecedent debt is not a taker for value. In the opinion of the court by RYLAND, J., the following strong language occurs: "A man catching at every chance to save himself never inquires, so he can obtain collateral security, about the fairness of the transaction. He gives nothing for it; he risks nothing for it. Then, common sense and common honesty unite in saying he shall take it with the defenses the other parties have against it in the hands of the original holder and party. We do not say that a bill of exchange, passed to a person in the payment of a pre-existing debt, would be liable in his hands, without notice, to the equities or defenses of the original parties; but that the holder of a bill merely as collateral security for a pre-existing debt, having given no value for it, no consideration for it, holds it liable to such equities. We know that there are authorities whose phraseology may be construed against this view, but we also know that there are authorities in its favor, and we think reason and justice unite in supporting it." *Ib.* 116. In a case between the same parties and apparently on the same instrument (though how this came about does not appear) which went from the circuit court of the United States for the district of Missouri to the supreme court of the United States (*Goodman v. Simonds*, 20 How. [U. S.] 343), the court refrained from deciding this question, being of opinion that it was not presented by the record. The question next came before the supreme court of Missouri for decision in *Grant v. Kidwell*, 30 Mo. 455, and it was ruled, in a short and ill-considered opinion, delivered without referring to the leading authorities on the question, and without making any allusion to *Goodman v.*

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Simonds, that the endorsee of a negotiable promissory note assigned before maturity, as an indemnification against an antecedent liability, takes it discharged of prior equities. The question next came before the supreme court in *Boatmen's Savings Institution v. Holland*, 38 Mo. 49. The plaintiff had taken the note from the payee as collateral security for an antecedent debt, and was now suing the maker upon it. The maker offered certain evidence, for the purpose of showing that the note had been given to the original payee upon a consideration which had failed. It was held that the trial court rightly rejected this evidence. WAGNER, J., said: "It was wholly irrelevant, and, had it been introduced, it would not have constituted the shadow of a defense. A pre-existing debt, or an antecedent liability, incurred by an endorsee of a negotiable note assigned before maturity, is a sufficient consideration to support the title of such endorsee." The court cited *Swift v. Tyson*, *supra*, and also its previous decision in *Grant v. Kidwell*, but made no reference to *Goodman v. Simonds*, *supra*, although it had been cited in the printed briefs.

If the question rested here, it would be entirely clear that, so far as bills of exchange and promissory notes are concerned, the transferee in pledge for an antecedent indebtedness gets as good a title as one who parts with the present value. But these decisions are succeeded by a line of *dicta* and decision which tend to create the impression that the courts regard the doctrine of *Goodman v. Simonds* as still the law of this state. The principle of that decision was recognized by the supreme court in *Logan v. Smith*, 62 Mo. 455, 458, and in *Davis v. Carson*, 69 Mo. 609, 610; by this court in *Terry v. Hickman*, 1 Mo. App. 119, 124, the court saying that it was "controlling authority;" was acted upon by this court as authority in the decision of *Brainard v. Reavis*, 2 Mo. App. 490, 493—where the

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court, with singular inconsistency, cited in the same connection *Grant v. Kidwell, supra.* Again, in *Hodges v. Black*, 8 Mo. App. 394, there is a *dictum* that "one who takes a note before maturity, merely as collateral for a pre-existing debt, where the facts are such as to raise no new consideration, is not regarded in Missouri as a holder for value free from all equities between the original parties,"—citing *Terry v. Hickman, supra.* This case was affirmed by the supreme court, adopting the opinion of this court, in 76 Mo. 537. Again, in *Skilling v. Bollman*, 73 Mo. 665, 670, the rule in *Goodman v. Simonds*, was recognized by the court in the following language from the opinion by HENRY, J.: "Eminent jurists and judicial tribunals hold that one who, for a prior indebtedness, receives a bill of lading for goods, either as collateral security, or in payment of such indebtedness, has no such title as will avail, even against the vendor's right of stoppage *in transitu;* in other words, that such a one, in such controversy, is not to be regarded as a *bona fide* purchaser for value. (Citing cases.) And *Goodman v. Simonds*, 19 Mo. 106, and *Logan v. Smith*, 62 Mo. 455, recognize the principle pronounced in the foregoing cases." The rule in *Goodman v. Simonds* was again recognized and distinguished in *Deere v. Marsden*, 88 Mo. 512, the court holding that, where a present consideration, as an agreement express or implied for a delay, however short, supervenes, the rule of that case does not apply. Still later, in *Crawford v. Spencer*, 92 Mo. 498, 509, our supreme court made a similar ruling, following *Deere v. Marsden, supra,* and quoting from the decision in *Goodman v. Simonds, supra,* the latter portion of the passage which we have quoted from it in this opinion. Finally in *Feder v. Abrahams*, 28 Mo. App. 454, 457, where the question was whether a transfer by a failing debtor to one of his creditors, in payment, makes the transferee a purchaser for value, it

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was said by ROMBAUER, J.: "Plaintiff claims that the decision in *Deere v. Marsden*, 88 Mo. 512, questions the rule stated in *Hess v. Clark*, 11 Mo. App. 492. This, however, is in an obvious mistake. The supreme court in that case simply re-affirmed the proposition, which has been the law of this state since *Goodman v. Simonds*, 19 Mo. 107, that one who takes collaterals for a pre-existing debt, without any new consideration to support the transfer, is not a purchaser for value of such collaterals." The case which was thus regarded as pronouncing what has ever since been the law of this state was, as I have above shown, *twice* overruled upon cases in judgment, *once* thereafter re-affirmed and applied, and *nine times* thereafter expressly or impliedly recognized as the law. The manner in which our courts have thus dealt with a question of such great importance to the commercial community affords a striking illustration of the imperfect way in which judicial work has been done in this state produced, no doubt, largely by the over-crowded state of the dockets of the courts, and the excessive amount of work thrown upon the individual judges. If the doctrine of *stare decisis* were strictly adhered to, it would unavoidably result in the conclusion that one who takes *negotiable paper*, as collateral security for an antecedent indebtedness, takes it as a purchaser for value; for such was ruled in our supreme court in *Boatmen's Savings Institution v. Holland*, 38 Mo. 49, where the question was before the court in judgment, which is the last controlling decision upon the subject. But in view of the manner in which our supreme court has subsequently dealt with the question, I do not think that we are at liberty to hold that it is concluded by that decision. We should rather regard it as still an open question.

If we were to rest our decision upon the analogy of commercial paper and upon the authority of *Boatmen's Savings Institution v. Holland*, *supra*, it would result

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in a reversal of the judgment of the circuit court in this case; because it would indisputably appear that the plaintiffs became *bona fide* purchasers for value of the whiskey in controversy, when they received from Conrad the warehouse receipts as collateral security for what he owed them, and especially since the circuit court refused an instruction, tendered by the plaintiffs, asserting this principle. But if we were to take this course, we should place ourselves in the inconsistent position of deciding (perhaps erroneously) the question upon the law of Missouri in one of its controlling aspects, and upon the law of Kentucky in another; for, on the question we are considering, the law of Kentucky is settled that one who takes commercial paper, merely as security for an antecedent indebtedness, is not a taker for value, but holds it subject to prior equities. *Lee v. Smead*, 1 Metc. (Ky.) 628; *May v. Quinby*, 3 Bush. (Ky.) 96. When we considered, in a former portion of this opinion, the question of the validity of these warehouse receipts as creating pledges of the property in favor of the plaintiffs, we found that, under a decision of this court, supported by decisions in other jurisdictions, they were invalid; but we also found that they were valid by the law of Kentucky, which law, however, had not been proved as a fact in the trial court. We therefore found that we could not affirm the judgment on that point, since the question had not been raised in the trial court, and, if it had been there raised, the objection could have been obviated by the plaintiffs putting in evidence the law of Kentucky, by which law, it is agreed, the rights of the parties are governed. Upon the same principle, we must now hold that we cannot reverse the judgment as being against the law of Missouri on the point under consideration (the analogy of commercial paper), since, if we were to take this course, the defendants could, on another trial of the cause, put in evidence the law of Kentucky, which on this subject is contrary to the law

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of Missouri. We cannot, especially, take this course in the unsettled state of the law of Missouri. If the law of Missouri is that the taker of commercial paper, as collateral security merely, is a purchaser for value, within the rule which protects him against prior equities, and if this is a controlling analogy in dealing with the subject of warehouse receipts, nevertheless, knowing as we do that the law of Kentucky, by which the question in this case is governed, is to the contrary, we should be bound to say that the decision of the court upon this point, if erroneous in the precise state of the record, was a harmless error.

We now have to dispose of an argument of counsel for the plaintiffs, based upon the assumption that we are to follow the analogy of commercial paper in deciding the question under consideration. It is this: That the rule, under which the transferee of commercial paper for an antecedent indebtedness takes it subject to equities, applies only in the case of accommodation paper where there is a *fraudulent deviation*, that is to say, where the paper has been given to the payee for a limited or special purpose, and he has, in fraud of the rights of the maker, transferred it for a different purpose. The courts which take this distinction affirm the rule that an endorsee of a negotiable note made for the accommodation of the endorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and is not affected by the defense of want of consideration set up by the maker. *Grocer's Bank v. Penfield*, 69 N. Y. 502; *Pitts v. Vogelsong*, 37 Oh. St. 676; *Dunn v. Weston*, 71 Me. 273. See also *Freund v. Bank*, 76 N. Y. 352; 14 Am. Law Rep. 486. The argument is that, as the evidence of the plaintiffs tends to show that Stagg, Hume & Co. conferred upon Conrad an unlimited authority to issue warehouse receipts in respect of the whiskey in

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the bonded warehouse at Silver Creek, this unrestricted authority necessarily included the right on his part to pledge it for his antecedent debts. We know of no rule of law which requires us to take this view. The most that can be said in favor of this view is, that it would be the conclusion of fact to be drawn from other facts, and whether the conclusion ought to be drawn was a question for the trial court, and not for this court. But it is to be observed that the conclusion would, upon the evidence in this record, be in the nature of a violent presumption. There is no evidence whatever in this record that any member of the firm of Stagg, Hume & Co. ever gave or intended to give to Conrad authority to do *what was done*—to pledge, in contemplation of insolvency, the whiskey which they had made for him on credit, and which remained in their warehouse, to his relatives and friends for his antecedent debts. Suppose that he had solicited authority from them to do this, could any one for an instant believe that they would have granted it? It is further to be observed that any course of reasoning, which holds that, because they did authorize him to use warehouse receipts merely as a means of transferring title to these goods while in their warehouse *in the ordinary course of trade*, they are to be held as having authorized him to use them for the destruction of their own legal rights,—is a course of reasoning which would destroy the vendor's lien in every case; because, as we have observed, the very existence of a vendor's lien always assumes that the title to the goods has passed to the vendee, since a man cannot have a lien on his own goods. The vendor has sold the goods to the vendee on credit, marked them, designated them, set them apart, and placed them under his dominion and control in such a sense that the title has passed and that there has been an executed sale. What is this but to say to the vendee; "Take the goods; they are yours; deal with them as you choose; here is a writing saying

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that I have sold them to you." But notwithstanding all this, if, while they are yet in the actual possession of the vendor, he were to sell them, or to mortgage them, even in the course of trade, by any process which does not amount to a transfer of the possession of them in theory of the law,—on the plainest principles, the vendor's lien would revive upon his insolvency, even as against the sub-vendee. The sub-vendee would stand in the shoes of his vendor and get no higher title than his vendor. *Dixon v. Yates*, 5 Barn. & Ad. 313; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93; *Southwestern Freight, etc. Co. v. Stanard*, 44 Mo. 71. In other words, it is the transfer of *possession*, and not merely the transfer of *title* which cuts off the vendor's lien; and, in nearly every case of executed sale, the vendor gives the vendee the *power* of transferring possession, and that was all that was given in this case in the authority to issue warehouse receipts. They were a mere means put into Conrad's hands of delivering constructive possession to others.

Recurring, then, to the analogies in which we have sought for a rule of decision upon the question whether the rights of the plaintiffs as holders of these warehouse receipts are superior to the rights of Stagg, Hume & Co., as unpaid vendors in possession, we find that they are all in favor of the conclusion that the rights of the unpaid vendor are superior, and that the plaintiffs are not to be regarded as purchasers for value, except the one which relates to the assignment of commercial paper; and that, while the law on this subject is unsettled in this state, it is settled in accordance with the other analogies in Kentucky, by the law of which state the rights of the parties are governed. We therefore hold that the plaintiffs are not to be regarded as purchasers for value, and that the vendor's lien of Stagg, Hume & Co., founded on actual possession, took precedence of their constructive possession as pledgees.

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In the case already alluded to, which was twice before this court and the supreme court (*Skilling v. Bollman*, 6 Mo. App. 76; s. c., affirmed, 73 Mo. 665; s. c., *sub nom. Skyles v. Bollman*, 12 Mo. App. 598; affirmed, 85 Mo. 35), the court merely decided that one who takes a bill of lading, as collateral security for an antecedent debt, gets a better title than one to whom the consignor has subsequently transferred a *duplicate exemplification* of the same bill of lading in fraud of the rights of the first taker, although the second taker gets actual possession of the property—a principle several times affirmed in the English courts, and a very simple one; for the title of a person to property lawfully acquired is not to be divested, even in favor of an innocent person, by a subsequent fraud of the transferor, for which the first taker is not responsible. The second taker gets nothing, because his vendor has nothing to transfer. *Nemo dat quod non habet. Whistler v. Foster*, 14 C. B. (N. S.) 248.

V. One question remains to be considered. It is strongly urged that, even if we take this view, yet, notwithstanding this, the plaintiffs are entitled to be regarded as having a better right on the principle of *estoppel.* In our opinion the record does not show a state of facts on which an estoppel can be predicated. The doctrine of equitable estoppel cannot be invoked, unless what was said or done by the party to be estopped can be shown to have influenced the conduct of the other. *Eitelgeorge v. Building Ass'n*, 69 Mo. 52; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Rogers v. Marsh*, 73 Mo. 64; *Noble v. Blount*, 77 Mo. 235. It must have had the effect of misleading the party asserting the estoppel. *Hydraulic Press Brick Co. v. Newmeister*, 15 Mo. App. 592. This one element of an estoppel is nowhere presented by the record in this case. It is not shown—and if it was the fact it was for them to show it—that the plaintiffs

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altered their position in any way to their disadvantage on account of the representation which Stagg, Hume & Co. may have held out to them, by publishing Conrad as the owner of this warehouse and of the whiskey stored therein, and by allowing him to issue warehouse receipts as such owner. If an estoppel, such as is now claimed, can be built upon a presumption or a surmise, it is easy to see that it would totally destroy the rule, applied in so many situations as already seen, which places a subsequent purchaser in the shoes of his vendor; for a case can scarcely be imagined—and this must be especially true in cases where commercial paper is transferred as collateral security for antecedent debts —where an attenuated estoppel could not be conjured up to destroy the rule of many jurisdictions which deprives such a transferee of the advantages of a *bona fide* holder for value.

We have thus endeavored to track this most difficult and complicated case over all the ground outlined by the counsel in their arguments. We are greatly indebted to the counsel on both sides for the aid which their learning, ability and industry have afforded us in arriving at the final solution of the questions presented. We have endeavored to decide the case in accordance with settled rules of property, without throwing into the scale any loose conceptions of justice or equity. We cannot, however, refrain from observing in conclusion that the result at which an adherence to legal principles, as we understand them, enables us to arrive, is in consonance with what seems to be the plain justice of the case. The vendor's lien, like the analogous doctrine of stoppage *in transitu*, is favored in the law. *Mullir v. Pondir*, 55 N. Y. 325, 337; *McEwan v. Smith*, 2 H. L. Cas. 309, 328, per Lord CAMPBELL; *Calahan v. Babcock*, 21 Oh. St. 281; s. c., 8 Am. Rep. 63, 65. It does not rest upon any strictly logical basis. It has been the outgrowth of a struggle for justice. It is founded

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in the obvious conception of justice, that one man's goods ought not to be applied to the payment of another man's debts. *Heinz v. Railroad Transfer Co.*, 82 Mo. 233, 236. It was, indeed, said by one English judge that "it has always been certain that the owner might retake his goods, on their passsge, by any means short of felony, if he had subsequent grounds for believing that the purchaser would not perform his part of the contract by paying for them." GIBBS, C. J., in *Litt v. Cowley*, 1 Holt. N. P. 338; s. c., 7 Taunt. 169. It was, in like manner, said by a judge, who has been regarded as the father of the system of equity jurisprudence, that if the vendor "had got the goods back again by any means, provided he did not steal them, I would not blame him." Lord HARDWICKE in *Snee v. Prescot*, 1 Atk. 245, 250. And yet, if the present actions had been allowed to be well founded, the very consequence against which the courts of justice have struggled would have taken place in this instance. One man's goods would have been wrested from his actual possession in order to pay another man's debts.

It results from the foregoing that the judgment of the circuit court must be affirmed. Judge PEERS concurs. Judge ROMBAUER, having been of counsel, did not sit. It will, perhaps, be more satisfactory to the parties to state that Judge LEWIS, who was a member of the court when the cause was first submitted, after examining the record and the printed arguments, was also in favor of affirming the judgment.

[The Reporter is directed by Judges THOMPSON and BIGGS to state that, pending a motion for rehearing, Judge BIGGS succeeded Judge PEERS as a member of the court; the motion was taken under advisement for a considerable time, and all the questions involved in the case were gone over by Judge BIGGS, as though the case had been newly presented; and that he concurred in overruling the motion, for the reasons stated in the foregoing opinion.]

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CASES DETERMINED

IN

St. Louis and the Kansas City

COURTS OF APPEALS.

OCTOBER TERM, 1889.

Nelson Cole *et al.*, Appellants, v. **Frederick Skrainka**, Respondent.

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St. Louis Court of Appeals, October 22, 1889.

1. **Custom, Effect of, in the Construction of Municipal Ordinances for Public Improvements.** An ordinance for street improvements, which calls for "a pavement of granite blocks, eight inches deep," can be construed in the light of a custom prevailing at the time of its adoption and defining the dimensions of the granite blocks used, as not less than seven nor more than eight inches deep, and in such case a contract made under such ordinance, and calling for granite blocks of the dimensions so defined by custom, is not invalid.

2. ———. Such custom is not unreasonable, if it be impracticable to construct the pavement called for by the ordinance with granite blocks all exactly eight inches deep, and the provisions of the ordinance be substantially complied with by a pavement in conformity with such contract.

3. ———. A usage of trade, defining the meaning of a term or expression, need not be ancient; it is sufficient, if it has existed for such time as to establish an intention, on the part of the contracting parties, to use the expression in the sense thus defined.

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Appeal from the St. Louis City Circuit Court.—Hon. Leroy B. Valliant, Judge.

Affirmed, (*certified to the supreme court**).

A. R. Taylor, for the appellants.

David Goldsmith, for the respondent.

Rombauer, P. J., delivered the opinion of the court.

This is a proceeding in equity seeking to cancel a special tax bill, issued by the city of St. Louis, to the defendant contractor *in full payment* of the work done and materials furnished by him in reconstructing a street upon which plaintiffs' property abuts. The tax bill under the charter is a *prima facie* lien on the property. The contract under which the work was done included the taking up and removing of the old pavement, the preparing with concrete and hydraulic cement of the roadway, the renewing and re-adjusting of the curbing, and the paving of the roadway with granite blocks laid on a concrete base. The *sole claim for relief* by the plaintiffs is based on the ground that the contract was illegal for non-conformity with the ordinance, and that the special tax bill issued by the city for the work is a cloud upon plaintiffs' title. Upon a trial of the cause the court dismissed plaintiffs' bill on the ground, that there was no substantial variance between the ordinance authorizing the work and the contract, nor any substantial variance between the requirements of the contract and its performance.

We may state at the outset, that no claim is made in the petition of any other variance between the ordinance and contract, than the one relating to that part of the work which refers to the depth of the granite blocks. The trial court, as above indicated, heard evidence on both propositions, namely, whether there was a fatal variance between the contract and the ordinance, and

*By Judge Thompson, who dissents.

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whether the work was done in substantial compliance with the contract. There was no pretense that the material used, general scope of the work, and manner of its execution, were different from those prescribed by the ordinance and contract; hence any variation to the owner's prejudice, between the requirements of the contract and its execution, was wholly foreign to the issues in the case. If any such existed, the owners' remedy at law by recoupment was complete. *Creamer v. Bates*, 49 Mo. 523. Not even on the widest conception of his rights in equity could the owner seek a cancellation of this tax bill, if the work was authorized by ordinance and contract, on the sole ground, that variations existed between the contract and its execution, which, while not changing the material or general scope of the work, rendered its performance less valuable to him. We may add in this connection that the court in *Creamer v. Bates*, *supra*, cites the case of *Marsh v. Richards*, 29 Mo. 99, which was the case of a common building contract, and the court in the case of *Yeats v. Ballentine*, 56 Mo. 537, which was the case of a common building contract, cites the case of *Creamer v. Bates*, recognizing no substantial distinction between the contracts of this class and other building contracts, as far as the question is one affecting the owner's remedy. All evidence therefore, which goes only to a variation between the contract and its performance, may be at once laid out of view as foreign to the case.

The substantial question presented is this: The ordinance provides that, on the concrete foundation, there shall be placed a pavement of granite blocks eight inches deep, set on edge. The contract provides in its specifications, "The blocks shall not be less than eight inches, nor more than twelve inches long, not less than three inches, nor more than four and a half inches wide, *nor less than seven inches, nor more than eight inches deep*, and dressed so as to approximate closely a rectangular form with opposite faces closely approximating equal areas." The fatal variance between the

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contract and ordinance is supposed to arise in the clause placed in italics.

The entire evidence concedes that a pavement of granite blocks eight inches deep, whether the words, eight inches, refer to the blocks or to the pavement as a whole, cannot mean that each block must be of the exact depth of eight inches, nor that the pavement, as a whole, must be of that exact uniform depth. Such a requirement would make a pavement of that character so costly as to become wholly impracticable. It would, as the uncontradicted evidence shows, more than treble the expense. If the term does not mean exact eight inches, it must mean something else, and what that something else is, is a question of fact to be determined upon the evidence. For the purpose of determining the meaning of the term, the plaintiffs introduced no evidence whatever. The defendant introduced the following evidence: Paving with granite blocks is of comparatively recent date in the city of St. Louis. Such pavements were not generally adopted until about ten years ago, and were originally made with six-inch granite blocks, which subsequently were changed to eight-inch blocks, as affording a firmer pavement. According to the defendant's witnesses (whose evidence is wholly uncontradicted) the term eight-inch block was known and treated by all parties bidding, as well as by the board of public improvements, to mean a block of between seven and eight inches deep, so that the term had acquired, between the parties employing it, a trade meaning prior to the execution of the contract in controversy. The ordinances never specify the work to be done except in a general way; the details of it are shown by specifications in the street commissioner's office, and all bids are made subject to such specifications. The specifications for inspection in this case were identical with the specifications embodied in the contract.

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It will be thus seen that, in no view of the case, could there be any question, under the evidence, of fraud or want of consideration, even if such questions could be considered under pleadings which do not raise them. The contractor's bid offered in evidence by plaintiffs refers to letting number 1669, in accordance with the printed form of contract and specifications for said work. The printed form of contract and specifications is conceded to be the contract and specifications under which the work was done. There was no secrecy in the matter, and the meaning of the term, eight inches, could be misunderstood by no one, since the specifications as above seen described the dimensions of the blocks to be used, in detail.

The appellants' counsel argues that the meaning of the term, eight inches, could not be varied by trade usage, or an agreement between the contracting parties. That argument loses sight of the fact that the term in its very nature could not mean eight inches exact, and that the meaning of the term had to be defined by outside evidence of trade usage. Counsel further argues that usage could not fix the meaning of the term, as meaning between seven and eight inches, because such usage would not be reasonable, and was not shown to be sufficiently long continued to create a custom. Whether the usage was reasonable, depends on the fact, as to whether a block between seven and eight inches deep is of substantially the same service in constructing a good pavement as one of a greater depth than eight inches. The testimony on that subject is uncontradicted, and is to the effect that it is of substantially the same service. The experts called by defendant, several of whom are wholly disinterested scientific men, testify that one of the main aims to be attained in the construction of these pavements is to secure a uniformity of upper surface. The depth of the excavation and concrete foundation are prescribed by the ordinance, and it is essential to a good

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pavement that the latter should have a uniform level. It is equally important that each block should have a proper sand cushioning, so as to prevent it from coming into direct contact with the concrete, which, in case the blocks are of greater depth than eight inches, might become unavoidable. These experts further testify that pavements do not wear uniformly down from the surface, but, after being worn down a certain depth, become shaky and cobbled and unfit for further use, and that, in their opinion, the specifications in the contract are a substantial compliance with the terms of the ordinance, and are designed to secure the pavement, provided for by the ordinance, and one substantially as good as if the blocks were of slightly greater depth.

In regard to the objection, that the usage was not sufficiently long continued to create a custom, it might be observed that the evidence tends to show that the usage is as old as the adoption of the eight-inch block pavement, and no usage can be older than the thing to which it refers. This is not a question of custom by which third parties are sought to be charged, but the question of the meaning of a term employed by the contracting parties. If the meaning of the term was well understood between the contracting parties, it is immaterial whether such usage was one day or one thousand years old. Nor is there anything in the law, or in the subject-matter of the contract, which prevents the meaning of the terms employed from being governed by usage. In *Soutier v. Kellerman*, 18 Mo. 509, a usage of trade, that a thousand shingles meant a bundle of a certain dimension, containing less than six hundred and twenty-five, was held to be reasonable and binding.

The board of public improvements of the city of St. Louis are the agents of the city in regard to all street improvements. All ordinances for such purpose must emanate from the board. R. S. 1879, p. 1608, secs. 14, 15 and 16. The assembly has no power to contract,

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either directly or indirectly for any public work. *Ib.*, p. 1610, sec. 27. The ordinances are all framed by the board, and so was the ordinance in question. It is an initial and necessary step of the contract, and the same rules apply in its interpretation, as apply in the interpretation of every other instrument. When the ordinance uses the words, eight inches, it means substantially eight inches, regard being had to the purpose for which the blocks are used. The meaning of that term is defined by the specifications, subject to which the contractor bids, as a block between seven and eight inches deep. The meaning of the term is well known to the contractor and all other bidders, and well known to the board, which employed it, in drafting the ordinance, in the sense given to it by common usage and in the sense in which they have always employed the term. The block thus provided for is the proper block for constructing the entire pavement according to its scope and design. We cannot see how, under these circumstances, there can be any reasonable doubt that the contract is a substantial compliance with the ordinance, in view of the proposition that equity deals with the substance of things and not with their form.

If the contract is void under the charter, and thus wholly illegal, it furnishes no basis of recovery in any form of action. *Keating v. City of Kansas*, 84 Mo. 419. There is no difference in principle between contracts of municipal corporations, and contracts of individuals in that regard, further, than that in the former a grant of power must be shown, and, in the latter, the power is presumed and the restraint must be shown. That the city had power to pass the ordinance is conceded. If it made a contract in substantial conformity with the ordinance, the contractor cannot lose the benefit of his work owing to unsubstantial variations between the ordinance and contract, or the contract and its execution. *Neenan v. Smith*, 60 Mo. 292; *Sheehan*

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v. Owen, 82 Mo. 458; *Eyermann v. Provenchere*, 15 Mo. App. 256; *Leominster v. Conant*, 139 Mass. 384.

With the concurrence of Judge BIGGS, the judgment is affirmed. Judge THOMPSON, who dissents, is of opinion that the decision rendered is contrary to previous decisions of the supreme court and Kansas City court of appeals. It is therefore ordered that the case be certified to the supreme court for final determination.

DISSENTING OPINION.

THOMPSON, J.—This is a suit in equity to cancel a special tax bill issued by the city of St. Louis to the defendant, under a contract for reconstructing with granite pavement a street against which the plaintiffs' property abutted. By the charter and ordinances of the city, applicable to the subject of this special tax bill, it is made a lien against the property in respect of which it is issued. The plaintiffs predicate their right to the relief claimed on the ground that the tax bill is invalid for the reason that the ordinance authorizing the reconstruction of the street provided that the pavement should consist "of granite blocks eight inches deep, set on edge," etc., and that the board of public improvements, in violation of the terms of this ordinance, entered into a contract with the defendant for the reconstruction of the street, which contract specified that the pavement should be but seven inches deep. The defendant admitted the passage of the ordinance, the letting of the contract to him, the doing of the work thereunder, the issuing of the tax bill to him therefor, as recited in the petition, and that it is a lien and charge on the plaintiffs' real estate therein described. The answer denies the other allegations of the petition, and avers that "said contract was in every material respect in accordance and compliance with said ordinance, and that it was not in any respect inconsistent

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with said ordinance." It then sets up certain matter apparently by way of estoppel, though it is not distinctly averred to be such, which will be hereafter considered.

On the hearing it appeared conclusively that the ordinance pursued the language above quoted, requiring the pavement to be laid with granite blocks "*eight inches deep*, set on edge," etc., and that the contract, which purported to have been executed between the board of public improvements, on behalf of the city, and the defendant, in pursuance of this ordinance, and under which the work was done by the defendant, did not require the pavement to be eight inches deep, but recited that it should be "*not less than seven inches nor more than eight inches deep.*" Several gentlemen (members of the board of public improvements and contractors of public work) testified to the effect that a pavement, "not less than seven nor more than eight inches deep," was as good and durable as a pavement eight inches deep. Against the objection of the plaintiff, evidence was given to the effect that, for *two years or more*, a *custom* had existed, between the board of public improvements and contractors of public work, of carrying out ordinances drawn in terms like the ordinance involved in this case, by contracts with specifications such as those in the contract in this case. There was also evidence on which the defendant predicates an *estoppel*, which will be separately spoken of hereafter. The circuit court, on consideration of this evidence, dismissed the petition, and the plaintiff appeals to this court.

Three questions arise on this record: *First.* Was there a variance between the ordinance and the contract of such a material or substantial character as to render the contract void? *Second.* If so, are the plaintiffs entitled to the remedy here sought? *Third.* If they are otherwise entitled to the remedy, have they estopped themselves by their conduct from claiming it?

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I. It is a well-settled principle that authority to charge private property with the cost of municipal improvements is confined within the limits prescribed by the charter and ordinances passed in conformity therewith; that proceedings to this end are *in invitum*, purely statutory, and, therefore, to be strictly pursued. It has been said by the supreme court that "to enunciate any other rule than this would be to gravely announce the doctrine that, while the municipal law would be binding on the citizen, the representatives of the city could, at pleasure, disregard such law." *Leach v. Cargill*, 60 Mo. 316; reaffirmed in *City of Kansas v. Swope*, 79 Mo. 446. The same court has also said: "The ability of the city to create a lien on the property of one of its citizens, in the manner pointed out in the ordinance referred to, is founded not on any absolute or pre-existent right, but rests exclusively in an adherence to the method prescribed by ordinance in pursuance of the authority contained in the charter." *Kiley v. Oppenheimer*, 55 Mo. 374. These principles are a part of the elementary learning in the law of municipal corporations, and are not questioned by the counsel for the defendant in this case.

Another principle equally undoubted is that every contractor with a municipal corporation for the doing of public work is bound to take notice, not only of the terms of the ordinance under which the contract is made, but also of the terms of the charter under which the ordinance has been passed. He is bound to see not only that his contract complies substantially with the ordinance, (*Galbreath v. Newton*, 30 Mo. App. 393), but he is bound to go further and see that the ordinance is authorized by the charter. *Cheeney v. Brookfield*, 60 Mo. 53. If, for either of these reasons, his contract is void, he can neither enforce the special tax bill issued to him thereunder against the property against which the bills are issued, nor can he recover of the city for

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the doing of the work; for, as was said by our supreme court in considering this question, "from a void contract no cause of action can arise, whether on a *quantum meruit* or one sounding in damages." *Keating v. City of Kansas*, 84 Mo. 415, 419. See, also, *Galbreath v. Newton*, 30 Mo. App. 399.

But the principle that the courts will require the agents of municipal corporations, in making and in executing contracts for public work, the price of which is to become a charge upon the property of private persons, to pursue their powers strictly is not carried to unreasonable or impracticable limits. Our supreme court has announced the principle that mere irregularities, where the ordinances have been substantially complied with by the city authorities, and nothing done or omitted which could possibly have affected injuriously the interests of the property-owners chargeable with the costs of the work, will not deprive the contractor of his right to enforce the lien of his special tax bill against their property. That court has added: "We are not inclined to turn a plaintiff out of court, who has given his time and expended his money in the improvement of their property, on mere technicalities, which, in no manner, affect the substantial rights or interests of the parties." *Sheehan v. Owen*, 82 Mo. 458, 465. In like manner it has been said by this court: "Here, as elsewhere, courts of justice must take practical views of things. Public improvements must go on; and if the courts of justice, in their anxiety to protect property-owners from a reckless or oppressive exercise of this power, hamper its exercise with unreasonable or impracticable rules, it will result that municipal corporations will not be able to let out contracts for such improvements at a cost which fairly represents their value, and that none will bid for such contracts, except at prices at which they can afford to assume the speculative chances of unfriendly litigation." *Kemper v.*

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King, 11 Mo. App. 116, 129. These principles have been recognized by the supreme court and by this court in other cases. *First National Bank v. Arnoldia*, 63 Mo. 229; *Eyermann v. Provenchere*, 15 Mo. App. 256; *Creamer v. McCune*, 7 Mo. App. 91. I have no disposition in the present case to detract from their value or to restrict their application.

But I am of opinion that they do not extend so far as to sanction the palpable disregard of the terms of the ordinance which was made in drawing the contracts in question in the present case. Upon the face of the two instruments there is no room for doubt in reference to this question. An ordinance which requires a pavement to be laid eight inches deep is not complied with by a contract which permits it to be laid from seven to eight inches deep. The true meaning of the ordinance is that the pavement shall not be less than eight inches deep; the true meaning of the contract is that it need not be more than seven inches deep. The contract thus permits a variation of an inch from the depth prescribed by the ordinance, which variation is in no respect in favor of the city or the property-owners who must pay the cost, but entirely in favor of the contractor. Much evidence was introduced on behalf of the defendant, intended to show that this variance between the contract and the ordinance was immaterial; and, as already stated, several gentlemen, contractors and members of the board of public improvements, testified that a pavement such as the contract permitted was just as good and durable as a pavement such as the ordinance required; and the learned judge of the circuit court, in a written opinion, has so found. This is a case in equity, in which we rehear the cause as chancellors upon the same evidence upon which it was heard in the circuit court, and in which we are not bound by the conclusions of fact arrived at by the circuit court. It is idle for witnesses, however numerous

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or expert, to come forward and tell me that a pavement less than eight inches thick is as good as a pavement eight inches thick. A pavement wears from its surface downward. If, with a given traffic, a pavement of such stones, as this consisted of, will wear away to the extent of one inch in five years, it is demonstrably certain that under such a traffic a pavement of this kind seven inches deep has five years less to live than a pavement of the same kind eight inches deep. Mathematical conclusions and physical facts of universal knowledge and recognition cannot be overturned by the testimony of any number of witnesses, however expert or however worthy of general belief.

The evidence, indeed, shows that granite blocks could not be made *precisely* eight inches in depth, except at an expense so great that it is not to be presumed to have been contemplated by the ordinance. In the light of this evidence, I have no doubt that it is a proper interpretation of the ordinance that it is satisfied by a pavement, regular in its surface and character, having an *average depth* of eight inches, and that slight variations in performing a contract drawn conformably to it, either above or below this average depth, ought not to vitiate the tax bill, and thus deprive the contractor of his compensation. But the case with which we are dealing does not specially concern the manner in which this contract has been *performed;* it concerns the manner in which the contract has been *made.* The ordinance requires a depth of eight inches. The contract is complied with by a depth of seven inches.

The circumstance that ordinances for street improvements originate in the board of public improvements is one which does not seem to me to be relevant at all. In drafting those ordinances the board of public improvements performs a merely clerical of bureaucratic function, and the fact that it is invested with

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that function does not constitute it a judicial tribunal to interpret the ordinances when passed, and to make them mean something different from what they say. The ordinance when passed is the act of the legislative body of the city, and it necessarily prescribes the terms of the contract and the manner in which the work shall be executed, so far as it speaks upon that question.

Nor does the argument which supposes that bidders adjust their bids to the contract and presumably bid less for work of the dimensions of the contract than for work of the dimensions of the ordinance, whereby no one is harmed by the deviation, impress me with any force. I have already shown that it is the settled law of this state that bidders for such public work must look beyond the contract and take notice of the ordinance. An intending bidder, so acting, would at once discover this discrepancy between the ordinance and the contract. Certainly the discrepancy is sufficient to suggest to the mind of a prudent man, acting under proper legal advice, the possibility of the contract being held invalid, or at least the possibility of its inviting litigation. This would have the probable effect of deterring bidders, and preventing the contract from being let except at rates so high that bidders could afford to take the speculative chances of litigation.

Moreover, so much of the argument as assumes that the bidders adjust their bids to the terms of the contract in disregard of the terms of the ordinance,—that is to say, that they bid upon the conception that seven inches and not eight inches is the standard of the pavement,—proves too much; for such an argument would equally help out the contract if it prescribed four inches as the depth of the pavement, instead of eight inches, as required by the ordinance.

The main question, then, must come back to this: Whether there is a substantial difference between a pavement eight inches in depth and one seven inches in

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depth. A strict compliance with the spirit of the ordinance would reject every block, not substantially rectilinear and rectangular, and which would pass through a ring eight inches in diameter. But conceding that a reasonable interpretation of it would sanction a contract providing for what one of the defendant's witnesses calls a "play" in dressing the stone, I could understand why the contract might prescribe a stone which would produce a pavement having the average depth of eight inches, by specifying that no stone should be more than eight and a half inches or less than seven and a half inches in depth. But here it cannot escape attention that the so-called "play" is all into the hands of the contractor. The contract sanctions a variation from the terms of the ordinance in the direction of reducing the depth of the pavement, and actually prohibits any variation in the other direction. This has been done for no better reason, so far as I can gather from the record, than that the contractors and officials letting contracts have taken it into their heads to conclude that a seven-inch pavement is as good as an eight-inch pavement.

In the re-examination of a portion of the pavement in controversy (of which I shall speak hereafter), the evidence shows that twenty-nine stones were taken up. Of these, according to the testimony of a witness for the plaintiff, eight were *under* seven inches in depth, but according to the testimony adduced by the defendant but two of them were less than seven inches. The evidence, however, shows that a small portion only of the stones reached the depth of eight inches. In fact, the plaintiff's evidence is to the effect that the variation is from six to eight inches, and the defendant's evidence shows that the contractors regarded seven inches as the substantial standard. The whole evidence satisfies me that the ordinance has been carried out in accordance with the spirit which dictated the departure

in making the contracts under it. The legislature of the city has passed an ordinance calling for an eight-inch pavement, and providing that the cost of it be charged upon adjacent property under the terms of the charter. Under the contract as made and executed, the city has a seven-inch pavement, and it is proposed to enforce the payment for this pavement against adjacent property on the theory that it is substantially the pavement authorized by the ordinance.

The case of *Eyermann v. Provenchere*, 15 Mo. App. 256, is cited to us in support of the theory of the defendant. In that case, after the plan of the work had been made in the office of the sewer commissioner, an ordinance providing for the doing of the work was drawn up in the office of the president of the board of public improvements before being submitted to the municipal assembly, and, by a mere clerical error in drawing it, a branch sewer provided for in it was located in block 2050 and not in block 2051, as required by the plan in the office of the sewer commissioner. The ordinance was passed in this form; but apparently with the honest purpose of correcting this clerical misprision, the contract was left so as to require the making of the branch sewer in block 2050, in accordance with the original plan, and it was so done by the contractor. On a tax bill issued to him for the work he brought an action in the circuit court, and failed, for the reason that the contract did not comply with the ordinance. Thereafter, under a further direction from the board of public improvements, he executed the work in accordance with the ordinance, by constructing another branch sewer in block 2051. Thus, he did all that the ordinance required of him, and more; he constructed, in consequence of this clerical misprision, a sewer which the ordinance did not require of him, for which he received no compensation. We held that the fact that the work as originally done deviated from the ordinance

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did not prevent him from having compensation from the property-owners, chargeable with the cost of the work, for the work, after it had been done in compliance with the terms of the ordinance. That case does not help the defendant in this case; for here there is no pretense that the work was done in compliance with the terms of the ordinance, except in so far as the contract complies with it,—in other words, that a pavement was laid of an average thickness of eight inches, but the evidence indisputably shows the contrary.

II. Against the objection of the plaintiffs, the defendant gave evidence tending to show, that, at the date of the adoption of the ordinance under which the work was done, *the uniform practice and custom* prevailed, and had prevailed for *two years or more*, of carrying out ordinances like the one involved in this case by contracts containing the specifications in regard to the depth of the granite blocks which this contract contained; and that, under this custom, an eight-inch granite block, or a granite block eight inches deep, had become a business or technical term, and was understood by all contractors and quarrymen, as well as by the city officials and agents, to mean a block not less than seven nor more than eight inches deep. It is contended that the custom established by this evidence is to be looked to in the interpretation of the ordinance, in pursuance of the principle that where a law has received a practical or contemporaneous construction long acquiesced in, this construction will generally be allowed to prevail, and in accordance with the further principle that departmental practice under a statute will be looked to in arriving at its meaning. *United States v. Gilmore*, 8 Wall. (U. S.) 330; Endlich on Statutes, sec. 360.

So far as the evidence of the so-called custom is concerned, it may justly be observed that a custom on

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the part of those charged with the execution of the law to violate it is a bad custom, which will not be judicially recognized or enforced. The rule that a practical interpretation of a statute long acquiesced in will not be disturbed except for cogent reasons, and the corresponding rule that departmental practice will be looked to in determining the interpretation of a statute in doubtful cases, rest upon somewhat different grounds. An interpretation thus established, if it is contrary to the plain terms of the statute, will be allowed to stand only where it has been *long acquiesced in*, and where great public injury would flow from judicially establishing the correct interpretation. The maxim, *communis error facit jus*, is never applied where an erroneous interpretation of a statute, injurious to the public interests or to private rights, has sprung up within a recent period. In one case, Lord ELDON laid it down that in the case of a breach of a charitable trust, if the enjoyment of the property had been clearly a continued breach of the trust for two centuries, it would be just and right to disturb it. *Attorney General v. Bristol*, 2 Jac. & W. 321. While the decisions do not in general go to this length, yet the instances where unbroken usage has been allowed to establish the interpretation of a statute have been where the practical interpretation has stood for five hundred years (*Mansell v. The Queen*, 8 El. & B. 54, 72, 111); two hundred years (*Gorham v. Exeter*, 15 Q. B. 52, 69); one hundred years (*Packard v. Richardson*, 17 Mass. 131, 143); fifty years (*Lord Fermoy's Case*, 5 H. L. C. 729, 785); forty years (*Reg. v. Cutbush*, L. R. 2. Q. B. 373); or even thirty years. *Pease v. Peck*, 18 How. (U. S.) 595; *United States v. Recorder*, 1 Blatchf. (U. S.) 218, 223; *Clark v. Dotter* 54 Pa. St. 215. A recent author of a work of great learning and excellence, to whom I am indebted for these citations, adds: "It may, in general, be said, that the force of contemporaneous exposition, or the exposition involved in professional usage, is most properly

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confined to old statutes; whereas a recent statute, when brought into controversy, is to be construed according to its terms, not according to the views taken of it by the parties in interest." Endlich on Statutes, section 359; citing *Clyde Nav. Trustees v. Laird*, L. R. 8. App. Cas. 673.

It has been well reasoned that a custom at variance with the plain meaning of a statute cannot be sustained as a construction of it. On this ground an acceptance given by the secretary of war to contractors, upon whose contract no payment was due, was held void. Whether as an advance upon the contract or as a loan of the public credit, both of which were prohibited by an act of congress, notwithstanding such a usage had sprung up in the department of war. *Pierce v. United States*, 1 Ct. Cl. 270. So it has been held that, where the compensation of a public officer is fixed by a statute, he cannot recover additional compensation for expenses incurred by him in the performance of his official duties, although by a usage, long antedating the statute, such incidental expenses may have been paid without objection. *Albright v. Bedford County*, 106 Pa. St. 582. So, the chancery court of New Jersey has lately held that a practice on the part of the clerk of that court, pursued for many years, of taxing costs illegally in a given particular, could not be appealed to as establishing the legality of the practice. The court reasoned that an exposition of a statute contrary to its plain meaning, placed upon it by contemporaneous construction, is not acceded to by the courts "except under the pressure of a supreme necessity, as where valuable rights, resulting from the erroneous construction, must be destroyed or seriously impaired if it be not done. *Communis error facit jus* is a recognized maxim of the law, but it is seldom applied in the administration of justice, and never without the exercise of the utmost caution." *Booraem v. North Hudson County Railroad*, 44 N. J. Eq. 70, 77. So, it has been held that

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local custom at variance with a general statute cannot control the statute, even for that locality,—such as a custom of departing from the standard of weights and measures, fixed by a statute which is obligatory in its terms and character. *Noble v. Durell*, 3 T. R. 271. In like manner, it has been recently held that a statute making two thousand pounds a ton cannot be controlled by a custom of trade making twenty-two hundred and forty pounds a ton. *Godcharles v. Wigeman*, 113 Pa. St. 431. On the same principle I hold that a municipal ordinance, requiring a pavement to be eight inches in depth, cannot be set aside by a custom between the contracting officers of the city and the contractors, of two years' duration, to violate its terms by laying down pavements from seven to eight inches in depth. Under the charter of the city, of which we take judicial notice, it appears that it takes *four years* for the inhabitants of the city to change the legislative body of the city. If a custom in derogation of the rights of the people can spring up between a municipal board of the city and the contractors for the doing of public work such as shall have the force of law, in *half this time*, then the rights of the people are at the mercy of a municipal board, but one of whom is elected by the people and the contractors. Nor can this contract be supported under the theory of a custom of trade; for the only custom of trade which is shown is a custom which has sprung up, between the city officials and the contractors, in contravention of the terms of city ordinances, existing at the time and governing the conduct of the parties; and the letting and taking of public contracts is not a "trade."

III. Counsel for the defendant does not question the propriety of the relief sought for by the plaintiff, provided the contract is in fact void. I advert to the question for the purpose of showing that I have regarded it as too important to pass without observation. The usual case where a court of equity will lend

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its aid to remove a cloud from the title of an owner of land is where a deed, mortgage or other instrument exists of record, creating a defect in, or an encumbrance upon, the title of the complainant, which instrument is valid on its face, but invalid by reason of some fact which can only be established by extrinsic evidence. *Clark v. Insurance Co.*, 52 Mo. 272, 276; *Mason v. Black*, 87 Mo. 329, 344; *Beedle v. Mead*, 81 Mo. 297, 303. A special tax bill, such as the one under consideration, is conceded to be, under the charter of the city of St. Louis, a lien upon the land therein described if valid. Under the provisions of the charter, of which we take judicial notice, it remains of record in the office of the comptroller, and is there subject to inspection by intending purchasers or mortgagees. If it is valid on its face such persons will ordinarily conclude that the municipal authorities have complied with the law in the steps which have led up to the issuing of the tax bill, and they will hence not inquire to see whether the contract authorizing the work to be done was drawn in compliance with the ordinance. The books show that cases, where the invalidity of the instrument, which affects the title of the complainant, can only be shown by *parol evidence*, are stronger cases for the invocation of equitable relief than cases where the infirmity of the instrument is capable of being shown by other writings. But the rule is not confined to cases where the infirmity of the instrument can only be shown by parol evidence. It extends generally to cases where the instrument is *prima facie* valid, but void by reason of facts, which can only be shown by extrinsic evidence. That a municipal tax bill founded on a void contract is such an instrument, I have no doubt, especially in view of recent decisions in this state, tending to enlarge the scope of preventive remedies in such cases. *Beedle v. Mead*, *supra*; *Parks v. People's Bank*, 31 Mo. App. 12; affirmed in supreme court, opinion not yet reported.

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IV. The remaining question is whether the plaintiff has, by his conduct, *estopped* himself from the right to the relief which he here seeks. The argument in favor of an estoppel is predicated on the following state of facts, set up in the answer and shown by the evidence: The charter of the city (art. 6, section 28) provides that, on complaint by any citizen and taxpayer, that any public work is being done contrary to contract, or that the work or material used therein is imperfect, the board of public improvements shall examine into the complaint, and may appoint commissioners to examine and report on the work, and, after such examination or report, shall make such order as shall be just and reasonable, and that such decision shall be binding on all the parties. The revised ordinances of the city (page 749, section 16) further require that every contract shall contain and shall be made subject to an express provision of the same effect. Such a provision was contained in the contract under which the work in question was done. While the work was in progress, the plaintiffs and other property-owners availed themselves of these provisions, and made a complaint before the board of public improvements that the work was not being done *according to the contract*, and that the work and the materials furnished were imperfect. A committee was appointed by the board to examine into the complaint. It examined the parts of the work complained of, in the presence of the plaintiff Cole, of his attorney, and of the other complainants. In the course of this examination the committee required the defendant to tear up a part of the work. The committee found all the work and materials to be "*in compliance with the contract*, except two granite blocks which were slightly less than the required depth." They made a report to the board of public improvements to the effect that the contract had been substantially complied with, and that the slight deficiency in

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the depth of the granite blocks, which had been observed, did not materially diminish the value of the pavement. The defendant replaced the two granite blocks which were deficient in depth, and he was required to, and did, replace the pavement which had been torn up in the course of his examination. Upon this predicate of fact the contention of the defendant now is that, by availing themselves of their right to complain of the work *as being done contrary to the contract*, and of the work and materials as being different from what the contract required, the plaintiffs recognized the contract as subsisting and enforceable; and that, the defendant having, in consequence thereof, been put to trouble and expense, they cannot now be heard to deny the validity of the contract. I can see no element of an estoppel in these facts. I cannot understand upon what principle the fact, that these complainants insisted that the work should not be *worse than the contract*, estops them from showing that the contract is *worse than the ordinance.* The doctrine of estoppel cannot be invoked, unless what was said or done by the party to be estopped is shown to have influenced the conduct of the other. *Eitelgeorge v. Building Association*, 69 Mo. 52; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Rogers v. Marsh*, 73 Mo. 64. According to an approved writer, "the following elements must be presented in order to an estoppel by conduct: *First.* There must have been a misrepresentation or concealment of material facts. *Second.* The representation must have been made with knowledge of the facts. *Third.* The party to whom it was made must have been ignorant of the truth of the matter. *Fourth.* It must have been made with the intention that the other party should act upon it. *Fifth.* The other party must have been induced to act upon it." Bigelow on Estoppel, 43·. This definition was approved by our supreme court in *Acton v. Dooley*, 74 Mo. at page 67. None of

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these elements of estoppel existed under the evidence in this case. The complainants challenged the character of the work before the board of public improvements, in compliance with the charter and ordinances, as not being sufficient under the contract; but they made no representation, expressly or by implication from their conduct, that they would not challenge in the judicial courts any tax bill which might be issued to the contractor, on the ground that the contract under which the work was done was not in compliance with the ordinance. There is nothing whatever in the evidence tending to show that the defendant was induced to believe, by the conduct of the complainants in challenging before the board of public improvements the manner in which he was executing the contract, that they would not challenge the sufficiency of the contract itself in the judicial courts. If the contractor had been in doubt as to the goodness of the contract, and the complainants had encouraged him to go on with his work, then an estoppel might have arisen, on a principle analogous to the maxim, *volenti non fit injuria.*

Contractors have, under various pretexts, attempted to evade the rule which requires them to know at their peril that the municipal officers with whom they make the contract have power to execute it on the part of the municipality. In *Leech v. Cargill*, 60 Mo. 316, an attempt was made to escape the operation of the rule on the ground that the ordinance was merely *directory;* but the supreme court quickly disposed of that contention. In later cases they have attempted to escape it on this doctrine of estoppel. Such an attempt was made in *Perkinson v. McGrath*, 9 Mo. App. 26. In that case, the ground on which an estoppel was claimed was that the tax-payer wrote to the city engineer, demanding of him that the contractor should perform his contract, claiming that the work was not satisfactorily done, and asserting that, if it was not done in

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accordance with the contract, he would not pay for it. It was held that this did not estop the tax-payer from showing, as a defense in an action on the tax bill, that the ordinance under which it was issued was void. BAKEWELL, J., in giving the opinion of the court, said: "It is the duty of the contractor to see that he has a valid contract, otherwise he takes the work at his own risk. The owner of the property is under no obligation to examine whether all the formalities of law have been complied with in letting out the work; and where he saw a man making improvements, or what are called improvements, on his land, without his direction or consent, under color of a valid contract with the city, which has power to make such a contract and to direct the work to be done, he had undoubtedly the right to suggest to the city authorities that the work should be done according to the terms which the city had assumed to impose upon the contractor. In the absence of evidence that the property-holder had actual notice of the invalidity of the contract, under which the work was being done, there is nothing in the fact, that he insists upon the work being done according to the letter of the contract, that tends to show fraud. This may be looked upon as an attempt on his part to make the best of a bad business, but is certainly no declaration that he waives all defenses to an action on the special tax bill, or that he accepts or will pay for the work."

This question was considered at length by the Kansas City court of appeals in the late case of *Galbreath v. Newton*, 30 Mo. App. 394, which was an action on a special tax bill, wherein an estoppel was claimed on the ground that the defendant, together with other property-owners affected by the intended improvements, had *induced* the officers, charged with the making of the contract, and the contractor so to frame the contract as to deviate from the terms of the ordinance, by substituting flint bowlders for limestone as the material to be

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used in making the pavement. The court seems to have been of opinion that this estoppel had not been established by the evidence; but, in giving directions to govern a future trial,* expressed the opinion that, if established, it would avoid the defense that the contract did not comply with the ordinance. The court further expressed the opinion that the defendant would be estopped, if it could be shown, "that, though taking no part in the change of the contract himself, he had actual knowledge of the change or substitution having been procured by others, and knowingly acquiesced in the work done thereunder." I am not prepared to go so far as to hold with this *dictum* that the mere fact that the property-owner may have knowledge of a fact which renders the contract invalid, and, nevertheless, "acquiesces" in the doing of the work—which I understand to mean fails to object to the doing of it,—will estop him from setting up the invalidity of the contract in a future judicial proceeding. He is no party to the contract. He is no actor in respect of it unless he voluntarily makes himself such. He is not bound, by any rule of law with which I am acquainted, to object. He is not bound to disclose to the contractor the fact which renders the contract invalid when the law requires the contractor to know it at his own peril. The silence of the property-owner cannot be said to mislead the contractor into supposing that the contract is valid, because it is his contract and not the owner's, and the law requires him to know whether it is valid or not. I apprehend that an estoppel can only arise where the property-owner takes some *affirmative action*, which fairly leads the contractor to believe that the property-owner waives his right to object to the validity of the contract, upon the faith of which the contractor goes forward with the work and changes his position to his detriment.

I think that the decision of my associates in this case is contrary to the ruling of the supreme court in

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Kiley v. Oppenheimer, 55 Mo. 374; and to the decision of the Kansas City court of appeals in *Galbreath v. Newton*, 30 Mo. App. 384, 399; and that the case should be certified to the supreme court in conformity with the constitutional mandate.

DWIGHT TREADWAY, Respondent, v. JOSIAH A. PARKER, Appellant.

St. Louis Court of Appeals, October 23, 1889

Practice, Appellate. When the judgment of a circuit court is affirmed for failure of the appellant to file a transcript, as required, an affirmance with damages is not justifiable.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

ROMBAUER, P. J., delivered the opinion of the court.

The defendant appealed to this court, March 23, 1889, from a judgment rendered against him by the circuit, January 21, 1889. The defendant having failed to file a transcript of the record in this court, the plaintiff now produces such transcript and asks for an affirmance with ten per cent. damages for that cause alone.

In the case of *State ex rel. Christy v. Ryan*, not reported, but referred to in *Estey v. Post*, 76 Mo. 413, the supreme court decided that ten per cent. damages should be awarded in those cases only where the record is examined and the appeal found to be without merit. As upon this motion we are not called upon to examine into the merits of the appeal, we are not justified to award damages. The judgment is affirmed without damages. All the judges concur.

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JOSEPH DIEL, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Malicious Prosecution, Evidence of.** To warrant the submission to the jury of an action for malicious prosecution, there must be some evidence, that the defendant was a party to the prosecution complained of.

2. **Agency, Evidence of.** The declaration of an alleged agent is not admissible against a party without proof of the agency, and such agency cannot be established by the declaration itself. And this rule applies to a declaration made by a police captain to the plaintiff, on the arrest of the latter, that the arrest had been made by the defendant.

3. **Presumptions From Failure to Produce Evidence.** Ordinarily the failure to call as a witness one, who is equally within the control of both parties, will be no ground for any presumption against either party, and the unexplained silence of a party, though it in some cases adds force to the evidence of his adversary, is not sufficient to supply independent evidence of a fact, which is wholly unproved by the other evidence.

Appeal from the St. Louis City Circuit Court.—HON. JAS. E. WITHROW, Judge.

REVERSED AND REMANDED.

Henry G. Herbel, for the appellant.

(1) The court erred in overruling defendant's objections to the testimony of plaintiff as to the conversations had by him with the police captain. (2) The verdict is unsupported by the evidence, as it does not connect the appellant with the prosecution complained of, and the motion for a new trial should, therefore, have been sustained. *Brown v. Railroad*, 67 Mo. 122; *Railroad v. Donahue*, 56 Tex. 162; *Barrett v. Chouteau*, 94 Mo. 13; *Moore v. Railroad*, 28 Mo. 628; *Providence, etc., Co. v. Claire*, 127 U. S. 47. (3) The

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instructions given by the court at plaintiff's instance, and of its own motion, are erroneous. *Stoher v. Railroad*, 91 Mo. 518.

S. S. Bass and *H. A. Loevy*, for the respondent

The statement made by the police captain to the plaintiff was competent evidence. *Doering v. Hornsby*, 12 Mo. App. 571. The objection of appellant to its admission was not specific and must, therefore, be disregarded. *Margrave v. Ausmuss*, 51 Mo. 564; *Primm v. Rabeteau*, 56 Mo. 412; *Davis v. Hilton*, 17 Mo. App. 322; *Adler v. Lange*, 21 Mo. App. 519; *Boston v. Murray*, 94 Mo. 181; *Schumacher v. Spellbrink*, 25 Mo. App. 357; *Masonic, etc., v. Lackland*, 97 Mo. 140. Appellant's failure to produce the bills rendered by and vouchers issued to Waters, MacDonald and others for services rendered and expenses incurred by them in and about the prosecution of respondent, and its failure to offer Waters as a witness, afford a presumption that if these documents and that oral testimony had been introduced the evidence would have been favorable to respondent. *Bent v. Lewis*, 88 Mo. 470, 471; Best on Presumptions, p. 130; Thompson on Trials, secs. 794, 1045. The demurrer, at the close of the whole case, was properly refused. Ram on Facts [3 Ed.] p. 283; Thomp., Trials, sec. 1039; *Hill v. Jones*, 69 Mo. 587; *Chubbuck v. Railroad*, 77 Mo. 394; *St. Vrain v. Co.*, 36 Mo. 391; *State v. Derry*, 20 Mo. App. 535; *Sappington v. Railroad*, 14 Mo. App. 89; *Barrett v. Railroad*, 9 Mo. App. 226.

ROMBAUER, P. J., delivered the opinion of the court.

The only substantial question arising upon this appeal is, whether there was any evidence tending to show that the defendant had instituted the prosecution

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against the plaintiff which is the foundation of his cause of action, the suit being one for malicious prosecution.

The evidence on that subject offered by the plaintiff may be summarized as follows: In the evening of Monday, April 12, 1886, the plaintiff was arrested in the city of St. Louis by a police officer, and placed in custody at the police station. There is no direct evidence of the cause of this arrest, or who caused it to be made, except the statement made to him by the captain of the police, hereinafter referred to, that the railroad company had him arrested. After the defendant was arrested, one R. W. Waters, a conductor on one of the defendant's trains, came to the police station and identified him by saying, "That is the man." On April 13, 1886, the same Waters made an affidavit before a justice of the peace in St. Louis county, charging the plaintiff with having, on the previous day, made an assault, with intent to kill, on one Henry Foster, a brakeman "on the Carondelet branch of the M. P. R. R.," while such Foster was discharging his duty as a brakeman. A warrant was issued upon this affidavit, and the plaintiff was brought before the justice and held to bail. Several days thereafter the prosecution against him was dismissed by the state without a hearing upon the merits. Waters, Foster and some other employes of the defendant were present before the justice on two occasions when the case was set for hearing, but were not examined. R. S. MacDonald, an attorney of the St. Louis bar, was also present, apparently representing the state.

There was some evidence in the case from which the jury might legally infer that, on or about this time, there was a strike of some of the employes on defendant's road, but it did not appear that the plaintiff ever was an employe of the road. The general attorney of the defendant testified that in March or April, 1886,

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R. S. MacDonald was specially employed by the defendant to prosecute certain criminal cases which arose out of the depredations of the strikers, and was paid by the case, but there was no evidence that this particular case had any connection with the strike, or that MacDonald appeared therein upon the defendant's request, or that he was paid for his services by the defendant. None of the defendant's regular attorneys were shown to have had any connection with the case, or to have controlled it in any manner. Waters and MacDonald were present in the court room upon the trial of the present action, but were not called as witnesses.

The defendant demurred to this evidence, but the court overruled the demurrer, and submitted the case to the jury, who found a verdict for plaintiff.

It is an elementary rule that, before a defendant can be called upon to introduce evidence to discharge himself, the plaintiff must by some legal evidence show a liability on his part. The primary condition of such liability in this case was the fact, that the prosecution had been instituted or ratified by the defendant. *Barrett v. Chouteau*, 94 Mo. 13. When the prosecution is instituted by an agent, the authority of the agent in that behalf must be shown. We have searched the record in vain to discover any evidence of the fact that Waters was the authorized agent of the defendant for the purpose of instituting the prosecution. It cannot be legally inferred from the fact that he was one of the defendant's conductors. *Tucker v. Railroad*, 54 Mo. 181; *Mayberry v. Railroad*, 75 Mo. 492, and there is no other fact in the case from which it can be legally inferred. Nor is the fact that MacDonald appeared on behalf of the state any evidence of the fact that the defendant ratified the prosecution. Assuming that he had general authority from the defendant to prosecute certain criminal cases growing out of the depredations

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of the strikers, it does not appear that this was such a case. Presumptions and inferences are logically the same. From one fact proven, another may be inferred or presumed, if the inference or presumption is a logical result and, as such, legally admissible, but to hold that the fact thus inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture. *Moore v. Railroad*, 28 Mo. App. 628.

The plaintiff claims that the statement of the police captain, to the effect that the railroad company had him arrested, was some evidence tending to show the latter fact. That such a statement was made, appeared by the plaintiff's answer to a question, while testifying in his own behalf. This part of the answer was not responsive to the question, and the defendant at once moved the court to strike it out as incompetent evidence, which the court refused to do. This part of the answer was clearly improper, and the statement it contained was highly prejudicial to the defendant. Such a statement could be evidence against the defendant only in case the police captain's agency in making or causing the arrest were previously shown, and such agency could in no event be established by the declarations of the alleged agent. *Farrar v. Kramer*, 5 Mo. App. 171. An attempt is made of supporting the judge's ruling on this point by the authority of *Doering v. Hornsby*, 12 Mo. App. 571, where the officer making the arrest was permitted to testify to statements made, by the defendant giving directions in making the arrest; but it is evident that the cases are wholly dissimilar, as there the statements were those of the defendant himself and therefore clearly within the rule, which makes declarations and admissions of the party, sought to be charged, competent evidence against him.

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The plaintiff further claims that the fact, that the defendant failed to produce certain vouchers upon notice, and failed to call McDonald and Waters, who were present in court, as witnesses in its own behalf, is equivalent to some evidence; that the vouchers, if produced, and these witnesses, if called, would have substantiated plaintiff's case. This view, to say the least, is novel. If the plaintiff desired to enforce the production of the vouchers the statute provided an ample remedy. R. S. 1879, secs. 3644, 3645, and 3647. Ordinarily the circumstances that a particular person, who is equally within the control of both parties, is not called as a witness, lays no ground for any presumption against either. *Scovill v. Baldwin*, 27 Conn. 318; *Bent v. Lewis*, 88 Mo. 470. In some cases a presumption may arise, by the unexplained silence of one of the parties to the litigation, which will give additional persuasive force to the evidence of his adversary, but which is never potent enough to supply independent evidence of a fact, which is wholly unproved by other evidence.

Complaint is made of the instructions of the court given upon plaintiff's request, and on its own motion. Those given by the court of its own motion are copies of instructions given, and approved by this court, in a former case. *McGarry v. Railroad*, 36 Mo. App. 340. They would have been unobjectionable, if warranted by the facts. The first instruction given on behalf of plaintiff is subject to the objection pointed out in *Stoher v. Railroad*, 91 Mo. 518, that it seems to assume the authority of defendant's officers and agents. The words "*acting by its authorized agents and officers*" in this instruction are wholly unnecessary, and should be omitted if this instruction is asked upon a retrial of the cause.

For the errors above pointed out, the judgment is reversed and the cause remanded. All the judges concur.

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JOHN BAMBRICK, Assignee, Respondent, v. HUGH CAMPBELL, SR., *et al.*, Appellants.

St. Louis Court of Appeals, November 5, 1889.

1. **Special Tax Bills:** ASSIGNABILITY OF. Special tax bills for public work are assignable, and suit thereon may be brought in the name of the assignee.

2. **Evidence.** Such assignment, when made by a corporation, is sufficiently established by proof of an assignment in writing, signed by the president of the corporation; evidence of the president's authority to make the assignment is not requisite.

3. **Public Work:** VALIDITY OF ORDINANCE FOR. An ordinance of the city of St. Louis is not invalid, because, after its introduction, the municipal assembly submitted it to the board of public improvements with the suggestion of an amendment, and that board embodied the amendment in it, and returned it and recommended its passage, without altering the endorsement of the estimated cost of the improvement, made on the original draft of it.

4. ———. It is not necessary that such ordinance should contain a provision for advertisement for bids for the work; advertisement, which is in compliance with the requirements of the charter and ordinance for advertisement for bids for the purchase of supplies, will suffice.

5. **Special Tax Bills:** PENAL INTEREST ON. The institution of suit on such special tax bill is equivalent to a demand of payment, for the determination of the right to penal interest on the tax bill.

Appeal from the St. Louis City Circuit Court.—HON. JAS. E. WITHROW, Judge.

AFFIRMED.

Noble & Orrick and *H. A. Loevy*, for the appellants.

The petition did not state a cause of action. (*a*) Because the special tax bill was not lawfully assignable by the quarry company to Bambrick. R. S. 1879, sec.

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3462; *McInerny v. Reed*, 23 Iowa, 410. (*b*) Because there was no direction in ordinance 13,698 to the board to advertise for bids or let out contracts for the work. (*c*) Because ordinance 13,698 does not grant or give authority to the board of public improvements to advertise for bids and let out contracts for the proposed improvement. The special tax bill was incompetent, and improperly admitted in evidence, for same reasons, and because no authority in Bates, the president of the quarry company, to make an assignment was shown, nor was its seal affixed to the assignment. 1 Waterman, Corp. 445; *Campbell v. Metal Co.*, 96 Mo. 468; *Read v. Buffum*, 21 Pac. Rep. 555. The board of public improvements was without authority of law, after it had recommended the draft ordinance to the house, to amend or modify it in any respect. It was *functus officio* as to that duty There was no legal endorsement on the draft ordinance, as amended, of an estimate of the cost of the work to be done. This rendered ordinance 13,698 void. Charter, art. 6, sec. 15; *Kinealy v. Gay*, 7 Mo. App. 203; *Perkinson v. McGrath*, 9 Mo. App. 26.

Rowe & Morris, for the respondent.

The special tax bills were assignable. *Rudolph v. Decker*, 36 Mo. 465; *Enright v. Rice*, 89 Mo. 685. There is no authority for looking in the unauthorized record kept by the board of public improvements or the municipal assembly to ascertain whether they have conformed their conduct to the city charter in the recommendation of ordinances. *Railroad v. The Governor*, 23 Mo. 353; *City v. Foster*, 52 Mo. 519; *Ball v. Fagg*, 67 Mo. 484; *Ex parte Bedell*, 20 Mo. App. 129. The bringing of suit was equivalent to a demand on the tax bill. *Eyermann v. Provenchere*, 15 Mo. App. 271. The evident meaning of the charter, section 27, article 6, is that, when an ordinance is passed

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for a street improvement, the board "shall advertise for bids as provided for purchases by the commissioner of supplies," and that the work and material called for in the advertisement shall be the same as described in the ordinance.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff prosecutes this action on a special tax bill. The petition contains the usual averments and states, among other things, that the work was done by the St. Louis Quarry Company, to whom the tax bill was originally issued, and who, for value, assigned the same in writing to the plaintiff. There was judgment for plaintiff in the trial court, and the defendants appeal.

I. The first assignment of error is that the court erred in admitting any evidence in support of the petition, because the tax bill was not assignable, and therefore the plaintiff, as assignee, could not maintain the action in his own name. In *City v. Rudolph*, 36 Mo. 465, and *City v. Rice*, 89 Mo. 685, the supreme court decided that a tax bill issued to a contractor was an assignable cause of action, and these decisions preclude all argument on the subject, as far as this court is concerned. The first of these cases was decided in 1865, and established a rule of property which has been followed ever since, so that even if this court had power to disturb it, which it clearly has not, it would be both unwise and inequitable to do so.

II. The next complaint is that the assignment of the special tax bill was not proved. The tax bill offered in evidence contains the following indorsement:

"I hereby assign the within bill, for value received, to John Bambrick, and he is authorized to sign my name to the receipt.

"ST. LOUIS QUARRY COMPANY,
"M. L. BATES, Pres."

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The plaintiff proved that M. L. Bates was president of the St. Louis Quarry Company, and that the signature to the endorsement was in his handwriting. The objection was that no authority was shown in Mr. Bates, as president of the St. Louis Quarry Company, to assign the tax bill. Both parties assumed in the examination that the quarry company was a corporation. Presidents of corporations, by general custom, exercise certain powers in acting for the corporation. This custom has frequently been judicially recognized. 1 Morawetz on Private Corporations, sec. 538. The president, being the legal head of the body, when an act is performed by him, the presumption will be indulged in that the act is legally done and binding upon the body. *Southgate v. Railroad*, 61 Mo. 94; *Smith v. Smith*, 62 Ill. 493. The evidence in this case was sufficient to make out a *prima facie* case of a valid assignment in the absence of proof that the officer in question, under the charter and laws of the corporation, had no such authority.

III. It appeared by the defendants' evidence that the board of public improvements drafted an ordinance providing for the street improvement in question, and sent it to the municipal assembly, as the charter requires. The municipal assembly suggested an amendment, and submitted it to the board, who thereupon embodied the amendment into the ordinance, and recommended its passage. The ordinance as thus amended was passed. The amendment related to a change in the material and depth of the curb. There was an endorsement on the ordinance, as first prepared, showing the estimated cost of the improvement, and the apportionment of such cost. This endorsement was retained on the amended ordinance. These facts were shown by the journal of the house, and by the records of the board of public improvements.

The defendant claims that the facts thus shown were fatal to plaintiff's recovery; that the board became

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functus officio when it sent the first draft prepared by it to the assembly, and could not re-acquire jurisdiction of the matter, except by preparing and submitting an entirely new ordinance, with a new estimate and apportionment of the cost; and that the amendment of a pending ordinance was wholly unauthorized.

The object of the charter provision is to secure to the public, and to the property-owners affected by the improvement, the benefit of the skill and unbiased judgment of scientific men, removed from local influence. The provision is that no ordinances for the construction or reconstruction of a street shall be passed, unless recommended by the board of public improvements. That the ordinance in question was passed in the exact shape, in which it was recommended by that board, is not questioned; and it is certainly wholly immaterial whether, in so doing, the board made a clean copy or used its former copy and interlined it. By retaining the original estimate, the board simply declared that the change did not substantially affect the cost; whether the estimate was correct or not, is not a question for the courts. The trial court admitted all this evidence, as it tried the case sitting without a jury, and therefore we are not called upon to decide whether, under the rule stated in *Ball v. Fagg*, 67 Mo. 484, the minutes of the municipal assembly, or of the board of public improvements, were admissible at all for the purpose of showing that an ordinance, valid upon its face, was not legally passed, or whether the rule stated in *Ball v. Fagg* was set aside by the supreme court in *State ex rel v. Mead* 71 Mo. 266. This assignment of error is without merit.

The next assignment is that the ordinance providing for the improvement was void, because it did not contain a provision of advertising for bids under it. The charter provides that the board of public improvements shall in all cases, except in case of necessary repairs requiring prompt attention, prepare, and submit to the

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assembly, estimates of cost of any proposed work, and under the direction of the ordinance shall advertise for bids, as provided for purchases by the commissioner of supplies. The charter also provides that the municipal assembly shall provide by ordinance for the purchase of all articles by the commissioner of supplies, by advertising for proposals, and then goes on to state in detail the manner of advertising, opening bids, and awarding of contracts. It is the object of the charter to make advertisements and bids for public work conform to this provision, and the ordinance referred to in in the first charter provision, above quoted, by the words "under the direction of the ordinance" is an ordinance providing for advertising which conforms in details to the charter requirement in advertising for bids for supplies. The object of the provision is to secure to the public the same particularity and exactness in advertisements for all public work, as the charter requires in advertisements for supplies. No claim is made that the board did not advertise for this work with the same detail of description, as required by the charter provision and ordinance providing for advertising for supplies. The only claim is that this advertisement was provided for by another ordinance, and not the ordinance providing for the improvement. There is no merit in this assignment.

IV. The only remaining assignment is that the court erred in treating the date of filing the plaintiff's petition, and the issue of a summons thereon, as the date of the institution of the suit, and hence as the date of the demand, which fixes the plaintiff's right to penal interest. The charter provides that, in case the owner of the ground is a non-resident of the state, suit may be brought by attachment, which shall be a demand of its payment. In the case at bar, suit was brought by summons, and the defendants who are non-residents were subsequently brought in by publication. This court

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decided in the case of *Eyermann v. Provenchere*, 15 Mo. App. 271, that the charter does not imply that a demand prior to the institution of the suit is to be a condition precedent to recovery, and that there was nothing to take this class of cases out of the general rule, that the bringing of a suit is of itself a demand. If the filing of a petition and the issuance of a summons thereon fixes the date of the institution of the suit, and hence the date of demand against a resident of the state, even though he was not served with process upon that summons, but upon an *alias* subsequently issued, it is not perceptible, why it should not fix it against a non-resident. No question was made in the case as to the valid institution of the suit by summons, as the defendants appeared and defended on the merits.

Seeing no error in the record, we affirm the judgment All the judges concurring, it is so ordered.

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JONATHAN WARDEN *et al.*, Respondents, v. MICHAEL RYAN, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Principal and Surety.** If a contract be altered by the principal without the consent of the surety, so as to destroy its identity, the surety is discharged, and whether the alteration was for his benefit is immaterial.

2. ———. The new agreement being executed and binding, the fact that the original contract was in writing, and that it was changed without the consent of the principal, so as to make it conform to the new agreement, is immaterial.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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Valle Reyburn, for the appellant.

The defense upon which defendant relies, and which arises out of the conceded state of facts in this case, is the change in the building contract after the execution of the bond, without assent on his part, by increasing the consideration to be paid the contractors, the principals in the obligation. A material and subsequent modification of the contract for which the bond is indemnity discharges the surety. The rule discharging the surety does not spring from, nor is it affected by, any consideration, whether the modification is for the interest or to the detriment of the surety, but is founded on the doctrine that a surety, having pledged himself to the due fulfillment of a given contract, cannot be called upon to respond to a breach of a subsequent and different contract. Lloyd on Building and Buildings, sec. 69; Brandt on Suretyship, sec. 338; *Miller v. Stewart*, 4 Washington Circuit Court Reports, page 26, especially page 28 (affirmed on appeal in 9 Wheaton, p. 681); *Blair v. Ins. Co.*, 10 Mo. 566.

Taylor & Pollard, for the respondents.

The spoliation of a written instrument by a stranger does not invalidate it. *Medlin v. Platte Co.*, 8 Mo. 239; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Moore v. Ivers*, 83 Mo. 29; *Bridges v. Winter*, 42 Miss. 143; *Gordon v. Robertson*, 48 Wis. 493; 1 Greenleaf on Evidence, 566; *Nichols v. Johnson*, 10 Conn. 197. Again, an alteration or spoliation of a written instrument by an agent or custodian of it, when the alteration is not made by the consent of the owner, does not invalidate the instrument. *Lubbering v. Kohlbrecher*, *supra; Hagland v. Stephen*, 35 Conn. 521; *Van Brunt v. Eoff*, 35 Barb. 501; *Hunt v. Gray*, 35 N. J. L. 227. There was no ratification of the alteration. *Windsor v. Bank*, 18 Mo. App. 665; *Middleton v. Railroad*, 62 Mo. 579; *Cravens v. Gillion*, 63 Mo. 28; *Anderson v. Volmer*, 83 Mo. 406.

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ROMBAUER, P. J., delivered the opinion of the court.

The liability of a surety depends on the identity of the contract and its *strictissimi juris.* If the contract between the principals be altered without his consent, so as to destroy its identity, he is discharged, and it is immaterial whether the alteration be for his benefit or not, because he has a right to stand upon the very terms of his agreement. This proposition is so firmly imbedded in the law of principal and surety that no considerations of apparent equity are permitted to disturb it, however great the hardships may be which, in individual cases, appeal for a modification of the rule. The unquestioned law, thus stated, we are called upon to apply to the undisputed facts of this case.

The plaintiffs entered into a written contract with Francisco and Sanguinet for the erection by the latter of a building at an agreed sum of fifty-five hundred and sixty dollars to be paid in certain installments. The defendant became the surety of the builders, and bound himself to the faithful performance of the contract by them, and to their delivery of the building, discharged from all claims, liens and charges, within a specified time. The building was not delivered within that time, nor was it delivered free from lien claims. The plaintiffs were compelled to pay, and did pay, these claims, and thereupon brought the present action against the defendant surety, who interposed the defense, that the original contract had been altered so as to increase the consideration to be paid by the plaintiffs to his principals for the erection of the building; that thereby a new contract was substituted for the one, for the performance of which he had become surety; all of which was done without his consent.

It appeared from the plaintiffs' evidence that, within two days after the contract was signed, Sanguinet, one

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of the contractors, accompanied by the plaintiffs' architect, called upon the plaintiffs and stated that a clerical error had been made in footing up accounts, and that they could not complete the building unless the error amounting to six hundred and fifty-nine dollars and fifty cents was rectified. The plaintiffs then agreed to pay the contractors this additional amount of six hundred and fifty-nine dollars and fifty cents, making the contract price six thousand two hundred and nineteen dollars. That this was the transaction, admits of no doubt. In answer to the question, what did you agree to pay them, one of the plaintiffs says: "What the amount would be when the contract was footed up correctly, six thousand two hundred and nineteen dollars." The other plaintiff says: "They said they could not erect the building for that, and that they had made a mistake in footing up their account; so we told them to go ahead, and put that building up and we would give them six hundred dollars in addition."

The architect took the written contracts which had been executed in duplicate, and changed them by inserting sixty-two hundred and nineteen dollars and fifty cents as the consideration to be paid, and by striking out fifty-five hundred and sixty dollars, and by making corresponding changes in the installments. This he did without express authority from plaintiffs and without their knowledge. The payments of the various installments were subsequently made by the plaintiffs in conformity with the figures inserted by the architect. There was no evidence that the defendant knew of this new agreement or assented thereto.

All these facts appearing in the plaintiffs' evidence, the defendant at the close of plaintiffs' case requested the court to instruct the jury that the plaintiffs could not recover, which instruction the court refused.

The learned counsel for plaintiffs, aware of the danger of the situation, labors exhaustively to show

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that the alteration of the written contract by the architect was unauthorized, and that the liability of the parties, as dependent on that instrument, was not changed, notwithstanding such alteration or spoliation. But that argument loses sight of the real question at issue, whether the work by the contractors was done under the contract stated in that instrument, or under a contract subsequently made of which the written instrument formed only part. There was nothing to prevent the principals from making a new contract for themselves, although they could make none for the defendant without his consent, and if the legal result of the plaintiffs' act is equivalent to the making of a new contract, the mere fact that they had no such intention is immaterial; nor could it be said that the new contract was not supported by any consideration, because it was supported by the consideration of sixty-two hundred and nineteen dollars and fifty cents to be paid on one side, and of the building of the house for that sum on the other. That the contract thus made is not identical with the contract on which the defendant became surety, is evident, and the surety's liability depends on the identity of the contract.

An attempt was made by plaintiffs' counsel to show that this additional six hundred and fifty-nine dollars and fifty cents was a mere gratuity or *bonus*, and an instruction was asked on that theory. There is nothing in the evidence to support that view, or to authorize the jury to draw that inference legitimately from anything in the plaintiffs' evidence. Whether it was a gratuity depends not on the fact how the plaintiffs' viewed it in their own minds, but whether, under the uncontroverted facts, they were under a legal obligation to pay it, after they agreed to pay it. The contractors insisted on an agreement for the payment of this additional amount, owing to a mistake in the original bid, and as a condition precedent to their entering upon the

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performance of the contract on their part. It was optional with the plaintiffs to accede to this demand, or else hold the contractors to their original agreement, but when they acceded to the demand and agreed to pay a new consideration, they necessarily entered into a new contract. The architect by inserting this new consideration into the contract only expressed the true intention of the parties, even though the act of insertion was unauthorized. It might with equal propriety be said that if, upon a similar demand made by plaintiffs, the consideration would have been reduced instead of being increased, it would have been a gift from the contractors to the plaintiffs in no way affecting the liability of the surety.

These considerations necessarily lead to the conclusion, that the court erred in not instructing the jury, at the close of the plaintiffs' evidence, that, upon the case made, the plaintiffs could not recover; and further erred in submitting to the jury the question whether the additional consideration agreed to be paid by plaintiffs was a mere gratuity. We find no errors in other parts of the record, but for these errors we are bound to reverse the judgment, notwithstanding the seeming hardship of the case.

Judgment reversed and cause remanded. All the judges concur.

MARGARET A. McCARTIN, Respondent, v. WILLIAM J. McCARTIN, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Divorce, Ground for.** Acts of cruelty need not be sufficient to endanger life in order to be ground for divorce as indignities rendering the plaintiff's condition intolerable.

2. **Divorce:** ALIMONY. When awarded in gross and for the support solely of the wife, alimony should not ordinarily exceed one-half of the entire estate of the husband.

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Appeal from the St. Louis City Circuit Court.—Hon. Jas. E. Withrow, Judge.

Reversed (*nisi*).

Rowe & Morris, for the appellant.

Valle Reyburn, for the respondent.

Rombauer, P. J., delivered the opinion of the court.

This is a suit for divorce, by the wife against the husband. The grounds alleged are such cruelties as to endanger her life, and such indignities as to render her condition intolerable, and the answer is a general denial. The trial court made a decree in favor of the plaintiff, granting to her the divorce prayed for, restoring her maiden name to her, and awarding to her as alimony in gross the sum of fifteen hundred dollars. The defendant, appealing, assigns for error that the decree of divorce was unwarranted by the evidence, and that the alimony awarded is excessive.

The wife's evidence disclosed the facts that she was married to defendant in the year 1872, and lived with him until June, 1888; that the defendant, at periodical intervals from the date of their marriage until their final separation, was guilty of personal abuse of her in word and act, mostly when they were alone, but occasionally in the presence of others; that he struck her frequently, flung missiles at her, and on two occasions threatened her by flourishing deadly weapons. The testimony of the wife on these subjects was wholly contradicted by the husband, but was as to isolated instances corroborated by the testimony of other witnesses.

We are aware that the testimony in this class of cases has to be carefully analyzed, as it is almost uniformly colored by sentiment or prejudice, but we are

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satisfied upon a careful examination of the record that the court was warranted to conclude that the testimony of the wife was in the main correct, and, so concluding, was justified to grant her a divorce on the second ground stated in her petition. Acts of cruelty may not be sufficiently grave to endanger life, and yet may amount to such indignities as render the plaintiff's condition intolerable. *Dawson v. Dawson*, 23 Mo. App. 174; *Cannon v. Cannon*, 17 Mo. App. 393. This leads us to conclude that there was no error in the trial of the main issue.

The plaintiff at the date of the trial was thirty-seven years of age, and of average health. She herself testified that during the period of her coverture the medical attendance upon her did not exceed one hundred dollars in value. The age of the defendant does not appear. It does appear that he was a merchant tailor and in former years had fair success in his business, but whether such success continued during the last five years does not appear. The testimony as to his earnings or earning capacity for some time preceding the trial is of the vaguest character. He owned some real estate in the city, the unencumbered title to which was probably worth twenty-six hundred dollars, and which he sold for eighteen hundred dollars after the institution of the suit, subject to his wife's dower claim. His business as a tailor he sold, immediately preceding the trial, for four hundred dollars. The circumstances under which these sales were made were such as to give rise to the inference that they were made for the purpose of hindering or defeating his wife's claims for alimony about to accrue. Outside of these facts there was evidence that the defendant had boasted of winning considerable money by wagers on the last national election, and that several years anterior to the trial he had a bank deposit of two thousand dollars, which he kept in his wife's name to prevent its seizure by

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creditors. On the other hand, there was no evidence touching the necessities of the wife or her earning capacity, but it did appear that she spent several months, after separating from her husband, in eastern cities, visiting relatives and friends. No children born of the marriage are living, and no other parties are dependent on either the husband or wife for support.

There is no standard by which the amount to be awarded as alimony in gross is to be determined, each case being dependent on its peculiar facts. We may safely say, however, that where such award is made for the support of the wife alone, it should not ordinarily exceed one-half of the entire value of the husband's estate. It is the interest of the state to secure the stability of marriages, and excessive awards of alimony are apt to encourage suits for divorce. They are moreover apt to defeat the very object of the allowance, inducing the defendant, who considers himself oppressed by the action of the court, to evade the payment by placing his property beyond the reach of execution.

These considerations lead us to conclude that the allowance in this case was excessive. The husband's evidence shows him possessed of property of the value of twenty-two hundred and twenty dollars, and it does not appear whether he has other debts beyond his obligation to support his divorced wife. Any material increase in this valuation rests on bare inference, or a character far from conclusive.

The decree of the lower court, in regard to alimony, will be reversed and the case remanded for further hearing on that subject, unless the plaintiff, within ten days, will remit of the award the sum of five hundred dollars, and, in case of such *remittitur* being entered, the decree will, in all respects, be affirmed. All the judges concur.

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LEONTINE T. NEWCOMB, Respondent, v. SILAS B. JONES, Administrator of SUSAN E. SHOEMAKER, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Bank Check:** PRESUMPTION REGARDING. A check is presumed, *prima facie*, to have been given for value.
2. **Evidence.** An admission is not conclusive when there is no element of estoppel in the case.
3. **Instructions.** An instruction not warranted by the evidence is erroneous.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

Rochester Ford and *Paul Jones*, for the appellant.

There is no evidence to support the verdict in this case, and it ought not to stand. *Zwisler v. Storts*, 30 Mo. App. 163; *Ellis v. Bray*, 79 Mo. 227; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Fischer v. Trans. Co.*, 13 Mo. App. 133. The court erred in giving plaintiff's instructions one, two and three, because said instructions are not based upon the evidence given at the trial, and tend to mislead the jury by submitting to them issues about which there is no proof. *White v. Chaney*, 20 Mo. App. 389; *Benson v. Railroad*, 78 Mo. 504; *Lester v. Railroad*, 60 Mo. 268–9; *Bank v. Overall*, 16 Mo. App. 510; *Skyles v. Bollman*, 85 Mo. 35.

Hiram J. Grover, for the respondent.

Every check is, *prima facie*, presumed to be given for value received. *Morrison v. McCartney*, 30 Mo.

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187; *Chouteau v. Rowse*, 56 Mo. 67. When a check on a bank has been presented for payment, and payment has been refused, the check then imports a debt from drawer to payee, and it may be sued on without proving the consideration, value received being presumed. Daniels, Neg. Inst., sec. 1646.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff exhibited for allowance, against the estate of Susan E. Shoemaker, a demand founded on a check for one hundred dollars, drawn by said Susan in his favor, December 30, 1887, on the St. Louis National Bank. The probate court disallowed the demand, but, upon a trial anew in the circuit court, the plaintiff had judgment for the amount claimed. The errors assigned on this appeal are that there is no evidence to support the verdict, and that the court misdirected the jury in its instructions given on plaintiff's behalf.

The plaintiff's evidence consisted of the check, which was shown to have been signed by the decedent, and of the testimony of the cashier of the bank on which the check was drawn, who testified in substance: "That he knew the late Mrs. Susan E. Shoemaker, and that she kept an account in his bank; that the signature to the check dated December 30, 1887, for one hundred dollars, signed 'Sue E. Shoemaker,' was that of Mrs. Shoemaker; that said check was sent to the bank inclosed in a letter from Mrs. Leontine T. Newcomb, but that payment was refused because Mrs. Shoemaker had died before the check was presented." The witness further testified that Mrs. Newcomb had come to the bank several times to make some transactions for Mrs. Shoemaker; that she brought some notes of Mrs. Shoemaker's to the bank for collection for the credit of Mrs. Shoemaker's account; that Mrs. Newcomb had come to the bank once to get the bank-box of Mrs. Shoemaker,

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in which the bank was keeping securities and papers belonging to her, and that at this time Mrs. Shoemaker was not well enough to be out.

On behalf of the defendant, Mrs. Davis, a daughter of plaintiff and daughter-in-law of the decedent, testified in substance that her mother spent two days and nights at the house of the decedent, helping her in December, 1887, and that she (the witness) received a letter from her mother (the plaintiff), bearing date, Hamilton, Ontario, March 7, 1888. This letter was read in evidence to the jury, and such parts thereof as bear upon the present controversy are as follows: "Mrs. S. made me a present before she left, that she requested me not to speak of at the time. She got me to make out a check on the St. Louis National Bank, when I was transacting her business for her, for one hundred dollars, and signed it, saying she wished me to draw that in case she died, for my kindness to her and the children, but she did not want any one to know it. If she lived to get home in May or June she would then give me the amount, or let me draw it. I never thought much of it then, for I thought she might get well and come back and might 'change her mind,' as you always said she was so changeable. She also gave me that diamond stud to keep for Charlie, and in case he died to give it to Kier. I have it in safe keeping. She cautioned me to say nothing of these things to any one, but now that she is gone I will tell you, as you ought to know it. She wanted me to keep all her private papers, but I told her as I was going away I had better deposit them in St. Louis for her. I was so surprised at her confidence in me, for I did not think up to that time she had any regard for me whatever, but my kindness to her seemed to touch her deeply. She often said I seemed like a mother to her those days I staid with her and nursed her. She was so ill that last day I was with her that she could scarcely hold her pen, and asked me

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to make out the check, only taking the pen to sign it. At the time I thought she was going to have me draw some more money for her to take with her, as I had been getting it for her from the bank, but much to my surprise she said it was for me. I have sent the check to Mr. Nickerson and asked him to remit to me here."

The court upon the plaintiff's request gave three instructions, each of which embodies the element that if the check was given in payment of personal services rendered by the plaintiff to Mrs. Shoemaker, for which the latter expected at the time to pay, then the check was not a gift. One of the instructions is as follows:

"If the jury find from the evidence that, upon the request of Mrs. Shoemaker, Mrs. Newcomb, the plaintiff, rendered to Mrs. Shoemaker personal services of the reasonable value of one hundred dollars, and that Mrs. Shoemaker, at the time such services were so rendered, expected and intended to pay for the same at their reasonable value, and afterwards, on December 30, 1887, in consideration of the same gave and delivered to Mrs. Newcomb the check for one hundred dollars, in evidence herein, intending and expecting, either that it should be paid out of her funds at the bank, or that she herself would take it up or pay it, and that Mrs. Newcomb received said check, in consideration of said services, then they are instructed that said check was given for value received, and was not a gift, and their verdict must be for the plaintiff, even though they further find from the evidence, that plaintiff (having) held said check, under such circumstances, for more than two months and after Mrs. Shoemaker's death."

The first error assigned, that there is no evidence to support the verdict, must be ruled against the defendant. Every check is *prima facie* presumed to have been given for value received. *Morrison v. McCartney*, 30 Mo. 188; 2 Dan. Neg. Inst., sec. 1646. The execution of the check being proved, the plaintiff made out a *prima*

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facie case. But the second assignment is clearly well taken. The statement made by the plaintiff in her letter, that the check was given her as a present, was not conclusive evidence against her, since there are no elements of estoppel in the case. On the other hand the plaintiff's admission that the check was a present, and other expressions used in the letter furnished were persuasive evidence, that the check was a mere gift and unsupported by any valuable consideration, just as the check itself furnished presumptive evidence that it was given for value. It was for the jury to weigh the presumption against the admission, but it was not for the court to aid the presumption by referring the jury to conjectural facts, of which there was no evidence in the case. *Now* we can see *no* evidence in the record that Mrs. Shoemaker expected to pay for the services, if any, which the plaintiff rendered to her, much less that those services were of the reasonable value of one hundred dollars, or of any reasonable value. The check at best was evidence of the fact that it was given for the value of one hundred dollars, but not of the fact that such value consisted of personal services, or any other specific consideration.

The courts in this state have so frequently decided that instructions must be based upon the evidence, that a mere reference to the proposition is deemed sufficient.

For error in these instructions, the judgment is reversed, and the cause remanded. All the judges concur.

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State of Missouri, Respondent, v. Peter Roche, *et al.*, Appellants.

St. Louis Court of Appeals, November 5, 1889.

Cruelty to Animals. **Evidence that a horse was overdriven does not warrant a conviction under Revised Statutes, 1879, section 1609, in the absence of proof, that the overdriving was wilful and not accidental.**

Appeal from the St. Louis Court of Criminal Correction.
Hon. E. A. Noonan, Judge.

Reversed.

Henry D. Laughlin, for the appellants.

It was error for the court to allow the veterinary surgeon to testify that in his opinion the cause of death was produced by overexertion. Even if overexertion was the cause of the congestion that caused the death, still the state had not made a case by showing simply that fact. Overexertion is not necessarily cruelty, and yet overexertion was the most that the expert would assert. What might have amounted to the most reasonable usage with one horse may, of course, have been overexertion to this one.

P. W. Fauntleroy, for the respondent.

It was not error to permit the veterinary to state that the pulmonary congestion, resulting in the horse's death, was caused by overdriving. The veterinary was not stating the "cause of the cause of death," but "the cause of the state or condition of the horse which resulted in its death." The next and last point is that "even if overexertion was the cause of the congestion that caused the death, still the state has not made a case by showing simply that fact." Says counsel, and this is the

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pith of his contention on this score, "overexertion is not necessarily cruelty." That is true, but when the overexertion consists in driving a sound and well horse until it dies from overexertion, that is necessarily cruelly overdriving.

ROMBAUER, P. J., delivered the opinion of the court.

The defendants were convicted and sentenced upon an information under section 1609, Revised Statutes of 1879, charging them with unlawfully, wilfully and cruelly overdriving a horse, and thereupon prosecute this appeal. They assign for errors that the court admitted illegal evidence, and that all the evidence adduced did not warrant their conviction.

The testimony on behalf of the state, conceding that all of it was properly admitted, tended to show the following facts: The horse was hired by the defendants for an afternoon drive; they taking charge of it about three o'clock in the afternoon and advising the livery keeper about eight o'clock in the evening, by telephone, that the horse was sick. The livery keeper thereupon called at the place where the horse was, and found it suffering from pulmonary congestion, which is usually caused by overexertion. He testified that in his opinion the horse had been overdriven. The horse died shortly afterwards. On this evidence the defendants moved for a discharge. This motion being overruled, they adduced evidence tending to show that the horse was driven by them for a reasonable distance, at a moderate gait, and that it was sick when they hired it.

Statutes against cruelty to animals have rarely received judicial construction by courts of last resort, and we have been referred to no case by counsel for either party. In *Commonwealth v. Wood*, 111 Mass. 410, the jury were instructed that if the defendant in the proper exercise of his own judgment thought he

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was not overdriving the horse, he must be acquitted, and that he could not be convicted unless he knowingly and intentionally overdrove. The supreme court in commenting on this instruction says a proper exercise of his own judgment means the honest exercise of his judgment as distinguished from mere recklessness of consequences or wilful cruelty. In *State v. Hackfath*, 20 Mo. App. 614, where we had this section of our statute under consideration, we decided that the intent with which cruelty is inflicted on an animal is immaterial, provided the act itself was wilful and not accidental.

In the case at bar there was no direct evidence of any overdriving, but the act was to be inferred from the result, the result being one which is usual in cases of overexertion or overdriving. Giving the testimony adduced by the state its widest scope, and all that it tended to establish was that the horse had been overdriven. But overdriving, alone, is not a statutory crime, it must be wilful as distinguished from accidental. When the proof consists of circumstantial evidence, it ought to be consistent not only with the prisoner's guilt, but inconsistent with every other rational conclusion. 1 Greenl. Ev., sec. 34; Thompson on Trials, sec. 2505. In the case at bar the evidence adduced by the state is not inconsistent with an accidental overdriving If all the evidence is true, it in no way negatives the conclusion that the horse may have overexerted itself, although the defendants were ever so careful. The defendants' negligence or recklessness in overdriving the horse, which is the very gist of this action, is not only not proved by the state, but no facts are proved from which such inference necessarily arises to the exclusion of any other rational theory.

It results from the above that the court erred in not discharging the defendants on the ground that the state had failed to make a case against them. The judgment should be reversed and defendants discharged. All the judges concurring it is so ordered.

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SYENITE GRANITE COMPANY, Appellant, v. CHARLES H. BOBB *et al.*, Respondents.

St. Louis Court of Appeals, November 5, 1889.

1. **Practice, Appellate.** When a cause is transferred by the supreme court to one of the courts of appeals, the order of transfer must be treated as an adjudication that the court of appeals has exclusive jurisdiction of the appeal.

2. **Special Tax Bills:** ATTACHMENT IN ACTIONS ON. The remedy by attachment in actions against non-residents of the state being authorized by the charter of the city of St. Louis, a general writ of attachment may issue in such actions, and a special levy may be made under it on the property, against which the special tax bill is issued.

Appeal from the St. Louis City Circuit Court.—HON. GEO. W. LUBKE, Judge.

REVERSED AND REMANDED.

Leonard Wilcox, for the appellant.

The court should uphold the special provision of the charter of the city of St. Louis authorizing attachments in suits on special tax bills, if by any reasonable method of construction it can be done. *State v. Railroad*, 48 Mo. 471; *State v. Laughlin*, 75 Mo. 150; *Conner v. Railroad*, 59 Mo. 293; *Sedgwick v. State*, pp. 266, 267, note; Maxwell on Statutes, p. 495. The attachment was fully authorized by both the Revised Statutes and the special provision of the charter. 1 R. S., secs. 308, 435, 437, 455; 2 R. S., p. 1610; *City of Kansas v. Ridenour*, 84 Mo. 253, 261; *Ward v. Beggs*, 18 Barb. 139; *Frank v. Seigel*, 9 Mo. App. 467, 468. Although a motion for new trial and rehearing was filed, it was not necessary. *Slagel v. Murdock*, 65 Mo. 522, 524; *Parker v. Wangle*, 34 Mo. 340; *O'Conner v. Kach*, 56 Mo. 253. 262.

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T. J. Rowe, for the respondent.

The judgment in an action on a special tax bill must be a special one, and cannot run against property other than that benefited by the improvement. It cannot be a personal judgment. *Neeman v. Smith*, 50 Mo. 525; *St. Louis v. Allen*, 53 Mo. 44; *Carlin v. Cavender*, 56 Mo. 286; *St. Louis v. Bressler*, 56 Mo. 350; *Kiley v. Forsee*, 57 Mo. 390; *Louisiana v. Miller*, 66 Mo. 467. The remedy by attachment is founded on statutory law; and the writ when issued must be directed against all the property of the defendant. There is no statutory regulation authorizing a special attachment against particular property, consequently no such writ can lawfully issue. R. S. 1879, secs. 403, 415 and 416; *Gage v. Gates*, 62 Mo. 412; *Bachman v. Lewis*, 27 Mo. App. 89; *Bray v. McClury*, 55 Mo. 128. An attachment cannot be maintained in aid of an action on a special tax bill.

ROMBAUER, P. J., delivered the opinion of the court.

The substantial question presented by this appeal, is whether an attachment can be maintained in aid of a suit on a special tax bill.

The plaintiff contractor brought suit on a special tax bill for street improvements, against a number of defendants, part of whom were residents and part non-residents of the state. Upon the filing of the petition, statutory affidavit and bond, the clerk issued a writ of attachment in the ordinary form, which writ the sheriff levied upon the interest of the non-resident defendants in the property sought to be charged by the lien of the special tax bill.

At the return term of the order of publication, three of the non-resident defendants appeared and moved to dissolve the attachment, on the ground that attachment

does not lie for the cause of action set out in the petition. The trial court sustained the motion and dissolved the attachment. Hence this appeal.

The appeal was taken to the supreme court, presumably on the ground that the case involved the construction of the constitution of the state. As the supreme court remanded it to this court, we must treat its remanding order as an adjudication of the fact that this court has exclusive jurisdiction of the appeal, and that the case involves no constitutional question. *State v. Farrell*, 23 Mo. App. 176.

The charter of the city of St. Louis (section 25, article 6) contains a provision that in all suits upon special tax bills, "in case the owner of the ground is a non-resident of the state, suit may be brought by attachment." The identical provision is found in the city charter of 1870, article 8, section 15, and the freeholders who framed the present charter retained it. The charter is a public law. The freeholders who framed it were invested by the constitution with adequate legislative powers. The provision therefore is entitled to the same weight as if it formed part of any other public law, and must be enforced by the courts, unless it cannot be harmonized with law enacted directly by the legislature of the state. The judgment of the trial court can logically rest on no other foundation, than the assumption that the law in question cannot be thus harmonized, and that is in substance the gist of the argument made by the respondent in this court.

Former charters of St. Louis and other cities in the state contained the provision that the contractor might proceed to collect these special tax bills by ordinary process of law. The ordinary process of law, then known, was a general judgment and general execution against all the property of the owner, and the supreme court in *St. Louis v. Clemens*, 36 Mo. 467, and in other cases,

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following the mandate of the statute, decided that a general judgment and execution were the proper process in enforcing payment of these bills. That view was abandoned in *Neeman v. Smith*, 50 Mo. 528, where the court expressed a doubt as to the constitutional validity of a general judgment on a special tax bill and intimated that the judgment should be special against the property. In *St. Louis v. Allen*, 53 Mo. 50, the court decided squarely that a personal judgment in this class of cases was unconstitutional and void, yet, upon the second appeal of the case, affirmed a judgment against the property alone, which was entered upon a general verdict, although there was no express statutory warrant for such proceeding. *Seibert v. Allen*, 61 Mo. 482, 489.

It is an undoubted proposition that it is the duty of the courts to give such construction to a statute, if possible, as not to deprive it of all force and efficacy, and to enforce every provision of it as far as practicable. The same reasoning which in the cases above cited upheld a special judgment, in absence of any express statutory warrant authorizing it, is efficacious in upholding the seizure of specified property subject to a lien, on a general writ of attachment, where it is clear that an attachment is authorized and no special writ of attachment is provided for by law.

The argument that a tax is not a demand, and not the subject of a set-off, even if true, cannot defeat a right of attachment expressly authorized. *State ex rel. v. Donaldson*, 28 Mo. App. 190. That by the word attachment an attachment upon ordinary legal process is meant is evident, since that is the technical import of the word when standing alone. It results from these considerations that it is the duty of the courts to enforce the statutory remedy thus authorized, so as not to violate the adjudged law, which permits, in these proceedings, the seizure and sale of specific property only,

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and that it is not their province to deny a remedy clearly authorized on the sole ground of seeming technical difficulties in its proper enforcement.

The judgment is reversed and the cause remanded. All the judges concur.

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CHARLES D. STEVENS, Defendant in Error, v. NEWTON CRANE, Plaintiff in Error.

St. Louis Court of Appeals, November 5, 1889.

1. **Master and Servant.** Mere annoyance to the master, owing to the servant's conduct, is no ground for the discharge of the servant.

2. ———: DAMAGES FOR WRONGFUL DISCHARGE. When a servant is wrongfully discharged by his master, he is bound only to seek employment similar to that contracted for with such master, and his damages will not be lessened for the failure to accept other service, unless such other service was for such similar employment. But wages actually earned by the servant during the unexpired part of the contract term, though not for similar employment, may be shown in mitigation of damages for the wrongful discharge.

3. ———. The servant being employed to perform such duties as might be required of him for the management of an estate, all his time could be required, if necessary for the performance of his duties; and in such case the jury should not be directed to allow in mitigation of damages for wrongful discharge only the wages earned within such time as would have been required for the performance of said duties.

4. **Instructions.** An instruction which leaves it to the jury to say what constitutes good and sufficient cause of discharge is defective.

Writ of Error to the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

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Everett W. Pattison, for the plaintiff in error.

A correct interpretation of the contract precludes any recovery by the plaintiff below. Story, Cont., 33; Wharton, Cont., sec. 593; *Neenan v. Donohue*, 50 Mo. 493; *Dinsmore v. Livingston Co.*, 60 Mo. 241; *Hempler v. Schneider*, 17 Mo. 258; *Milner v. Field*, 5 Exch. 829; *Grafton v. Railroad*, 8 Exch. 699; *Oakley v. Morton*, 11 N. Y. 25; *Railroad v. Woods*, 14 Gratt. 447, 460; *Mizell v. Burnett*, 4 Jones L. 249, 256; *Bills v. Railroad*, 7 Baxter, 599; *Filley v. Pope*, 115 U. S. 213. The second and sixth instructions refused should have been given. The second is warranted by *Griffin v. Haynes*, 24 La. Ann. 480; *Stevens v. Walker*, 55 Ill. 151; Wood's Mast. and Serv. [2 Ed.] sec. 88; Bishop on Contracts, sec. 1416. The fourth is warranted by Schouler on Dom. Rel. *614; Wood's Mast. and Serv. [2 Ed.] sec. 116; *Dieringer v. Meyer*, 42 Wisc. 311; *Drayton v. Reed*, 5 Daly, 442; *Read v. Dinsmore*, 9 C. & P. 588; *Railey v. Lanahan*, 34 La. Ann. 426. In the first instruction given, the jury was told that plaintiff must account for money earned after his discharge, "and during the time he would have been engaged in work under said certificate if he had not been discharged." This last clause added an element that was not warranted by the evidence, was confusing, and was erroneous. The instruction asked by plaintiff in error on this point should have been given. *McLellan v. School Board*, 15 Mo. App. 362, 366; *Polk v. Daly*, 14 Abb. Pr. [N. S.] 156.

William B. Thompson, for the defendant in error.

The petition states a good cause of action on a breach of a written contract set forth in the petition which was performed according to its terms by the plaintiff, and the condition of its approval by the circuit

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court as provided was waived at the time of its execution, and it was performed with such waiver from its date to the date of the breach without any objection on the part of the defendant. *Dobbins v. Edwards*, 18 Mo. App. 307; *Rice v. Railroad*, 63 Mo. 321; *Melton v. Smith*, 65 Mo. 315; *Pond v. Wyman*, 15 Mo. 116; *Steinberg v. Gebhardt*, 41 Mo. 519; *Nearns v. Horbert*, 25 Mo. 352; *Stump v. Mueller*, 17 Mo. App. 290; *Little v. Mercer*, 9 Mo. App. 218; Benjamin on Sales [4 Ed.] 566; *Baker v. Railroad*, 19 Mo. App. 321. The uncontradicted facts in the case disclosed that the contract was performed with the waiver for three years, until March, 1883, when plaintiff was discharged, and such acts of both parties constituted a full and complete confirmation and ratification of the contract. Bigelow on Fraud, 184; *Dinsmore v. Livingston Co.*, 60 Mo. 241; *Estel v. Railroad*, 56 Mo. 282; *Dobbing v. Edmonds*, 18 Mo. App. 307. A contract for personal services is broken on a discharge of the party employed, and he can recover on the contract whatever damages he has sustained from the date of the discharge to the date of bringing suit, less what he has earned or could earn during this period. *Pond v. Wyman*, 15 Mo. 175 and 183; 19 Cent. L. J. 342; Wood on Master and Servant, 238, 237, and notes; *Koenigkraemer v. Glass Co.*, 24 Mo. App. 127.

Rombauer, P. J., delivered the opinion of the court.

The defendant was, in June, 1880, appointed by the circuit court, city of St. Louis, sole trustee under the will of Patrick M. Dillon, and gave bond conditioned faithfully to execute the trusts imposed upon him by reason of said appointment, as required by law, by order or decree of any court having jurisdiction, or by the last will and testament of Dillon. The estate vested in the trustee by the will and appointment consisted of numerous parcels of real estate in the city of St. Louis,

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and it was the trustee's duty to manage this property, collect rents, and invest the net proceeds in trust for certain devisees named in the will.

Shortly after the appointment was thus made, the defendant entered into a written contract with the plaintiff, of the following tenor:

"St. Louis, Mo., June, 1880.

"It is hereby agreed between Newton Crane, Esq., and Charles D. Stevens that the latter is hereby appointed agent of the former by and with the permission of the circuit court of the city of St. Louis, and at all times subject to the approval, orders and decrees of said court; to attend to such duties and perform such services pertaining to the care and management of the estate of Patrick M. Dillon, deceased, as shall be directed by said Crane, as trustee of said estate during the time said Crane shall continue to be such trustee, and as long as said Stevens shall well and faithfully perform such duties as may be required of him, the said trustee; in payment for which services rendered said Stevens is to receive one-half the compensation of said trustee.

"(Signed.) Newton Crane,
"Charles D. Stevens."

From the date of this contract until March, 1883, the plaintiff continued to perform such services in connection with the care and management of the estate as were required of him by the defendant. At the last-named date, the plaintiff was discharged by the defendant, and thereupon, in January, 1885, he instituted this suit for the recovery of damages caused to him by the discharge, which he claimed to be wrongful, and a breach of the contract of employment, and recovered a judgment for seventeen hundred and thirteen dollars and eighty-one cents.

The substantial errors, complained of by the defendant who prosecutes this writ, are that the court erred in

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hearing any evidence in support of a petition which states no cause of action, and that the action of the court in giving and refusing instructions was erroneous.

In support of the first complaint, the defendant contends that, as the action is one for breach of an express written contract dependent for its validity upon its approval by the circuit court, it was incumbent upon the plaintiff to plead and prove such approval; that, as the plaintiff failed to plead it, the court should have sustained defendant's objection to all evidence at the beginning, and, as the plaintiff failed to prove it, the court should have sustained a demurrer to the evidence at the close of plaintiff's case. In this view we cannot concur. As we read the contract it either asserts the permission of the circuit court as something already had, or else makes the continuance of the contract dependent on a tacit permission and approval as a condition subsequent. That the parties themselves put the latter interpretation on the contract is self-evident, as they regarded an express approval or permission by the circuit court unessential to its validity, and went on acting under it for a period of almost two years, without seeking such approval. That in point of law the express approval of the circuit court was wholly unnecessary to give validity to the contract, is a proposition too plain for argument. We see no error in the court's refusal to sustain the defendant's oral demurrer to the petition or his demurrer to the evidence, and must rule this point against the defendant.

The plaintiff and the defendant were the only witnesses in the case, each testifying on his own behalf. The plaintiff's evidence tended to show that he performed all duties required of him by the defendant, and that the sole ground assigned by the defendant for terminating the contract, and in fact the sole ground existing, was a desire on defendant's part to attend to the work exclusively, and save the expense of dividing

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the commissions. The defendant testified that he terminated the employment of the plaintiff because the plaintiff's services were of no benefit to the estate, because the plaintiff was absent from the city for months at a time, and because the beneficiaries of the estate objected to plaintiff's acting as agent. The defendant's testimony on the last point was weakened by the conceded fact, that, upon his own resignation as trustee, the beneficiaries joined in a written request to the court to appoint the plaintiff as one of the trustees to succeed him. It will be thus seen that this is not one of those cases where the facts bearing upon the character of the discharge stand conceded, and its rightfulness or wrongfulness is a mere question of law, but one where it depended upon disputed facts, and the question had to be submitted upon hypothetical statements to the jury.

On this branch of the case the defendant asked the following instruction which the court refused.

"To justify defendant in discharging plaintiff it is not necessary that plaintiff should have been guilty of any positive misconduct, or that there should have been on plaintiff's part an utter and entire want of ability or disposition to perform the duties required of him. If there was on plaintiff's part such want of attention to his duties, or such slack and inefficient service as to cause defendant annoyance, or such as to add to his labors rather than to diminish them, or if there was such conduct on plaintiff's part as to prevent the arrangement between the parties from being carried out to the satisfaction of defendant, or if plaintiff's relation to the other beneficiaries of the estate was such that his acting as agent had ceased to be for the benefit of the estate, or had become disadvantageous to the estate, then in any of these events defendant had the right to discharge plaintiff."

We see no error in this action of the court. The leading causes, justifying the discharge of a servant by

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the master, are wilful disobedience of a lawful order, gross moral misconduct, habitual negligence in business, or other serious detriment to the master's interests. Schouler's Dom. Rel. 612. A right of discharge may exist in particular cases which is outside of this classification, but no right of discharge can be predicated on the annoyance to the master by the servant's conduct, nor have we been referred to any case which constitutes the master the sole judge of the efficiency of the services rendered. As it does not appear that either the defendant or the court were under any obligation to consult the wishes of the beneficiaries in the management of the estate, the objection of the latter to plaintiff's continuance in the service was immaterial.

On the question of damages, the defendant asked the following instruction which the court likewise refused to give.

"If you find from the evidence that there is anything due plaintiff from defendant, then there is another question to be considered by you, that is, whether plaintiff has earned anything from other sources since his discharge by defendant. If you believe from the evidence that since that time plaintiff has earned any sum or sums of money, whatever, of if you believe from the evidence that he might by reasonable effort have been able to earn any money since that time, you will deduct the amount he has so earned or might have earned from the sum which you find to be due plaintiff. If such sum or sums in the aggregate equal or exceed the sum which you find to be due plaintiff, then you will render your verdict in favor of the defendant. And in determining whether plaintiff has, or might by reasonable effort have, earned anything since the date of his discharge, you are at liberty to consider all the testimony in the case, the statements of plaintiff, his manner while on the witness stand, what he has said about it, and what, if anything, he has refused to say."

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This instruction was likewise properly refused. In this class of cases the contract price for the unexpired term is *prima facie* the measure of plaintiff's damages. If the defendant seeks to mitigate these damages he can show that the plaintiff has received compensation during that period or part of it from other employment, or that he might by reasonable efforts have obtained compensation in other *similar* employment. His duty to *seek* employment is confined to similar employment, his duty to account for compensation actually received extends to all employment. *Koenigkraemer v. Mo. Glass Co.*, 24 Mo. App. 124; *Miller v. Woolman-Todd Boot & Shoe Co.*, 26 Mo. App. 57. The instruction offered does not keep this distinction in view and was for that reason erroneous.

The action of the court in giving plaintiff's instruction on the same subject was likewise erroneous, and necessitates a reversal of the judgment. That instruction tells the jury to find for the plaintiff, to the extent of the contract price, in case they find he was wrongfully discharged "unless the jury further find from the evidence that, during the period between the time the plaintiff was discharged and the bringing of this action, he earned money during the time he would have been engaged in work for defendant under the terms of said contract, if he had not been discharged, or by the use of reasonable diligence he would have earned money during said period, and during the time he would have been engaged in work under said contract, if he had not been discharged."

This instruction it would seem was drawn to bring the case within the rule stated in *Pond v. Wyman*, 15 Mo. 175, which is the leading case on that subject in this state, but the propositions there laid down are misconceived by counsel who drew the instruction. If the plaintiff's services in the case had been, by the terms of the contract, confined to stated parts of days, weeks or

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months, then it would be unreasonable that plaintiff should account for the value of such of his time which fell outside of the limits which the defendant controlled by contract. Such, however, is not the case here. The contract binds the plaintiff to perform such duties as may be required of him by the trustees, pertaining to the care and management of the estate of Patrick M. Dillon, deceased. There is no limitation whatever as to time, and the defendant might lawfully have required all of the plaintiff's time, if he deemed it necessary for the purpose stated. To tell the jury, therefore, that the plaintiff is accountable for what he earned during the time he would have been engaged in work for the defendant, under the terms of said contract, remits the jury to bare conjecture, and a verdict based on conjecture alone cannot be supported.

That this instruction was highly prejudicial to the defendant is evident, since there was evidence in the case tending to show that the plaintiff did earn, by practicing his profession as a physician, during the intervening period between his discharge and the institution of the suit, at the rate of fifteen hundred dollars per annum.

This instruction was further defective in leaving it to the jury to say what constitutes good and sufficient cause of discharge. *Miller v. Woolman-Todd Boot & Shoe Co., supra.* The court tried to remedy this defect by giving an instruction of its own motion as follows:

"If you believe from the evidence that plaintiff failed or neglected to properly and faithfully discharge any of the duties required of him by defendant, *and which defendant had the right to require of plaintiff* under the contract read in evidence, then defendant had the right to discharge plaintiff for such neglect or failure to perform such duty."

But this instruction was likewise erroneous in leaving it to the jury to determine what duties the defendant

had the right to require of plaintiff under the contract read in evidence. The words placed in italics rendered the instruction ambiguous and misleading.

Judgment reversed and cause remanded. All the judges concur.

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THE STATE OF MISSOURI at the relation of GEORGE W. WHITECOTTON, Prosecuting Attorney, Appellant, v. THE HANNIBAL AND RALLS COUNTY GRAVEL ROAD COMPANY, Respondent.

St. Louis Court of Appeals, November 5, 1889.

1. **Quo Warranto Against Corporations.** An action of *quo warranto* instituted against a corporation admits the corporate existence, and does not lie when the corporation is not charged with misuser or non-user of corporate franchises granted to it, nor with the usurpation of franchises not granted to it.
2. **Corporate Powers.** A corporation, authorized to construct a certain road and collect toll thereon, has the right to purchase a like road already constructed, and charge toll thereon.
3. **Quo Warranto Against Corporations.** The validity of the title of the corporation acquired by such purchase cannot be determined in an action of *quo warranto.*

Appeal from the Pike Circuit Court. -HON. E. M. HUGHES, Judge.

AFFIRMED.*

Robinson & Farrell, for the appellent.

Although the defendant was legally incorporated, and although the law, under which it was incorporated, authorized corporations organized thereunder to collect tolls, still the defendant never acquired any right whatever to erect toll gates and collect tolls on the old road bed of the "Hannibal, Ralls County and Paris Plank

*Judge Thompson dissenting.

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Road Company, and its persistent exercise of the right constitutes a misuser of its franchise for which forfeiture of its charter will be declared. High Ex. Leg. Rem., sec. 648, *p. 472; *Commonwealth v. Com. Bank*, 28 Pa. St. 383; *Mumma v. Potomac Co.*, 8 Peters, 287; *Terrett v. Taylor*, 9 Cranch, 43; Angell & Ames, Corp., sec. 776; *Attorney General v. Railroad*, 6 Iredell, 461. But even if it has not been guilty of misuse so as to warrant the court in declaring its charter forfeited, still the court should have rendered a judgment of ouster as to the particular franchise which defendant exercised without any lawful right, to-wit: Collecting tolls on the road bed in question. High Ex. Leg. Rem., sec. 648; *People v. Trustees, etc.*, 5 Wend. 211. Information in nature of *quo warranto* and not injunction is proper remedy. *Attorney General v. Ins. Co.*, 15 Johns. 358; s. c., 2 Johns. Chan. 371; *People v. Trustees*, 5 Wend. 211; *People v. Turnpike Co.*, 23 Wend. 197; 23 Wend. 254; 23 Wend. 222.

Harrison & Mahan, for the respondent.

The issue tendered by the information and answer is one solely of corporate existence. Our first proposition is that this issue cannot be tried in a proceeding instituted directly against the defendant alone, as sought to be done in this case. The question is, whether the persons who are doing business in the name and under the claim of a corporate right have deen legally authorized by the state so to act, or whether they are usurping corporate rights. This makes the officers of the corporation not only proper but necessary parties to the proceeding. A thing that never existed, or a non-existence, could not in the nature of things usurp any thing. A judgment could not of course be entered against a non-existence. The corporation is the necessary and proper party when its rightful corporate existence is conceded and a forfeiture is sought. "In a

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proceeding against a corporation the question is one of forfeiture, not of existence." Potter on Cor., sec. 675; Ang. and Ames on Cor., sec. 756. "When a corporation by name is charged in *quo warranto*, its legal existence is admitted, and non-performance of condition precedent cannot be inquired into." Morawetz on Cor., sec. 1030, note; *People v. Carpenter*, 24 N. Y. 86; *People v. Rensallear*, 15 Wend. 113; Boone on Cor., sec. 165. This is the doctrine of our state. *State v. Caffee*, 59 Mo. 59; *State v. Reynold*, 61 Mo. 203; *State v. Wood*, 13 Mo. App. 189; s. c., 84 Mo. 376. In proceedings by the state by *quo warranto*, there is no distinction between *de jure* and *de facto* existing. To question existence the state must proceed upon the theory of no legal existence. The information does not state a cause of action. 5 West. Rep. 592; 6 West. Rep. 276.

Biggs, J., delivered the opinion of the court.

The defendant is a corporation duly organized under article 4, chapter 21, of the Revised Statutes, 1879, with power and authority to construct and own a gravel road beginning at a point on the west line of the Hannibal and New London Plank Road on the county line between the counties of Marion and Ralls, thence westward on said county line two and a half miles, thence on the line of the gravel road of the Hannibal, Ralls County and Monroe Plank Road, to a point on said last-named road, where it crosses a county road in section 13, township 56, range 6, west.

The charter members of this corporation were Temple H. Davis and twelve other citizens of Marion and Ralls counties. The articles of incorporation were filed in the office of the secretary of state, and a certificate of incorporation issued as required by law on the fifth day of June, 1882. Since the date of its incorporation, the defendant has had the control and possession of an improved or gravel road located on the route indicated in its articles of association, and has erected toll

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gates thereon, and has been exercising the rights and franchises authorized by the statute under which it is incorporated, to-wit, to demand and collect toll from persons traveling over said road.

So far as the record in this case shows, it appears that the road so claimed and controlled by the defendant was originally owned and constructed by a corporation known as "The Hannibal and Ralls County and Paris Plank Road Company," hereinafter called the "Plank Road Company." This company was incorporated on the fifth day of May, 1852, in pursuance of an act of the legislature of Missouri, entitled "an act to authorize the formation of associations to construct plank roads and macadamized roads." Approved, February 27, 1851. Sess. Acts, 1851, 259. This company was authorized to build and construct a plank road from the city of Hannibal, through the counties of Marion and Ralls, in the direction of Paris, in Monroe county, to be located on such route as might be selected by the board of directors. This corporation immediately located its road and proceeded to procure the right of way for it, and to construct the same in compliance with the provisions of the statute. By the terms of the articles of incorporation, the existence of this corporation was limited to thirty years.

The act of 1851, section 6, provided that the directors of the road company, organized under it, "may, with the consent of the county court of the proper county, locate its (road) over and upon any state or county road or highway, and thereupon such state or county road or highway, or such portion thereof as may be occupied and appropriated by said company, *shall become the property* of said company for the purpose of making and maintaining said road and the gates and toll houses thereon. And the county courts of the several counties of this state are hereby authorized to consent to the appropriation and occupation of any such state or county road," etc.

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The directors of the plank road company located the greater portion of its road, now controlled and claimed by the defendant, and situated in Ralls county, along the line of a public road. The evidence shows that about two-thirds of the plank road for a distance of about six miles, and extending through Ralls county, was located on what was then known as a state road. Wherever the topography of the ground permitted, the line of the state road was departed from for the purpose of avoiding grades and shortening distances. After the road was located, the county court of Ralls county on the seventh day of July, 1852, by an order entered of record, consented to the appropriation of so much of the public highway as had been selected for the location of the plank road, and relinquished the use of the same to the "Plank Road Company."

On the fourth day of March, 1854, the "Plank Road Company," executed a deed of trust to secure the payment of certain promissory notes amounting to twelve thousand, four hundred dollars. This deed of trust conveyed to the trustees, therein named, all property belonging to the corporation, including the strip of ground or right of way on which its road was constructed, and all toll houses and the land on which they were built, and also all materials belonging to or used in the construction of the road. The money secured by this mortgage was borrowed for the use of the corporation, and presumably to pay a portion of the costs of the construction of its road. Default was made in the payment of the notes, and, on the eighteenth day of September, 1856, the trustees sold the property under the deed of trust, and at said sale one Thomas S. Miller and twenty-five other residents and citizens of Marion and Ralls counties became the purchasers, and received a deed from the trustees conveying all of the property described in the deed of trust.

On the seventeenth day of February, 1857, the legislature of Missouri (Sess. Acts, 1857, p. 435), by a

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private or special act, incorporated the purchasers of said plank road, under the name of the Hannibal, Ralls and Monroe Plank Road Company, hereinafter designated as the "Monroe Plank Road Company." Sections one and two of this private act of incorporation read as follows:

"Section 1. That the aforesaid purchasers of the Hannibal, Ralls county and Paris plank road and appurtenances, at the sale of the same by George A. Hawes and George B. Pogue, as trustees, on the seventeenth day of September, 1856, and their successors, and they are hereby declared a body corporate and politic, to be known by the name and style of the "Hannibal, Ralls and Monroe Plank Road Company;" and, as such, to have perpetual succession, and to hold property, and sue and be sued as other corporations. The corporation, hereby made, to have the like powers, privileges and franchises, and to be subject to the like restrictions, in all respects, as if they had been regularly and lawfully incorporated under and by virtue of the provisions of an act of the general assembly of this state, entitled, 'an act to authorize the formation of associations to construct plank roads and macadamized roads,' approved February 27, 1851. * * *

"Section 2. This corporation are to have the right to construct their road, or any part thereof, of gravel, and to charge tolls as if said road were a plank road entirely." * * *

The Monroe Plank Road Company continued to use and collect tolls on the road until the organization of the defendant corporation, when the stockholders of the old company, at a stockholders' meeting, voted to transfer all of the property of the old company to the defendant, in consideration of the issuance to each stockholder of as much stock in the new corporation, as he held in the old. This was accomplished and the stockholders of the old company became the incorporators of the new company. Thereupon the defendant

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took possession of that portion of the road formerly belonging to the old company, and hereinbefore referred to, and has continued since the organization, to-wit, June 5, 1882, to demand and collect tolls thereon.

This action was commenced in the circuit court of Ralls county, on March 21, 1887, and by change of venue was transferred to the Pike circuit. It is an information in the nature of a *quo warranto*, prosecuted in the name of the state at the relation of George W. Whitecotton, prosecuting attorney of Ralls county. The relator in substance complained that the defendant was unlawfully exercising a franchise without any warrant, charter or grant, to-wit, the right of keeping up toll gates and collecting tolls on that portion of the gravel road herein referred to and situated in Ralls county. The relator, by way of specific allegation, alleged the want of a legal incorporation of the defendant, and also that the use by defendant of that portion of the gravel road in Ralls county was unlawful and without warrant of law, for the reason that the county court of Ralls county could not, and did not, grant or relinquish the use of the public road, on which the gravel road was built, for a longer period than the life of the Hannibal, Ralls and Paris Gravel Road Company; that the original corporation had no right to sell or mortgage that portion of its right of way located on the public highway, and that the defendant was not the owner of said road bed or easement, but that the use of the same had reverted to the public as a highway. The relator also alleged that the defendant had permitted that portion of the road to become impassable for the greater portion of the time since 1882. He asked that the defendant be required to show by what authority or warrant it claimed to have and enjoy the franchises set forth.

The defendant answered and pleaded its incorporation, as herein set out, as its warrant or charter for exercising the right to maintain toll gates and collect tolls

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on said gravel road, and that it had succeeded by purchase to all the property rights of the original corporation in said road.

The court rendered judgment for the defendant on the ground that the plaintiff's remedy was not by an action of *quo warranto*, and we think the opinion entertained by the trial judge was right.

This is a proceeding against the defendant as a corporation; therefore, its corporate existence stands admitted. If the defendant was never legally incorporated, and the plaintiff desired an adjudication of that question, the information would have to be directed against the individual members of the corporation. But under the issue as made by the pleadings, there are only two questions that can be considered: *First.* Has the defendant corporation by *misuser* or *non-user abused* the privileges and franchises granted by its articles of incorporation? *Second.* Has the defendant *usurped franchises not granted* by its charter or other organic act of incorporation? Angell and Ames, Corp., [11 Ed.] sec. 734; 2 Morawetz Corp., secs. 938–1033; Boone, Corp., secs. 161, 162.

The plaintiff in the information charged an abuse of the corporate franchise by failure to keep the road in repair, but it failed to sustain the charge with any proof, and it was abandoned on the trial. So there can be no question in the case as to the abuse by defendant of its franchises and privileges by misuser or non-user.

But the plaintiff contends that the judgment should have been in his favor on the second proposition: *First.* Because a portion of the road in Ralls county, which defendant claimed to own, was a public highway, and that the defendant had erected toll gates and was demanding and exacting toll from persons traveling thereon, without having any title or interest in that portion of the road; and that for this reason the defendant had usurped franchises not granted. *Second.*

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Because the fundamental condition of the defendant's right to charge toll was the *construction of a gravel road, and not the purchase* of a gravel road already constructed.

I. An information in the nature of a *quo warranto* is a legal proceeding, and, when directed against a corporation, can only be made to operate on corporate franchises. Property rights cannot be interfered with or determined in such a proceeding. Morawetz, Corp., sec. 1033; Boone, Corp., sec. 167. The answer of a defendant in such a case must be either a disclaimer or a justification. In the case at bar, the defendant answered that it was duly incorporated under the laws of the state of Missouri, with power and authority to own or construct a gravel road along a designated line, to erect toll gates thereon, and demand and exact reasonable toll from persons traveling over said road, and that this was the defendant's authority for so doing. The only possible inquiry under this view of the case was, has the defendant such a charter, and, if so, is the road located according to charter requirements? There was no controversy about either proposition. The defendant was regularly incorporated, and was in possession of a gravel road located along the line designated by its charter.

The defendant being in possession of such a road, we do not think the courts would, in this action, permit an inquiry into the character of the defendant's title to the easement, and, if they found it defective in whole or part, make this a cause for forfeiture of the charter privileges. *People v. Turnpike Co.*, 2 John. 190; *People v. Whitcomb*, 55 Ill. 172; *State v. Kingan*, 51 Ind. 142.

The writ of *quo warranto* is employed to test the right of a corporation to exercise a franchise, and not to test the legality of any act of the corporation. If the defendant in constructing its road had taken possession of the land of a citizen without compensating him therefor, this would not justify a proceeding of this kind and

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authorize a forfeiture of the defendant's franchises. If the defendant is wrongfully obstructing the public highway, this matter can be easily remedied by appropriate proceedings.

II. If the "Monroe Plank Road Company" had no right to sell its tangible property, or if the purchase by the defendant was unauthorized or was not a substantial compliance with the terms and requirements of the statute, under which the defendant was incorporated, then the defendant has failed to comply with a condition subsequent, annexed to its right to exercise the franchise granted, and the forfeiture of the franchise, thus usurped, can be declared in a proceeding of *quo warranto.* 2 Morawetz, Corp. [2 Ed.] secs. 1022, 1023.

It must be conceded that the right exists in every corporation in this state to sell its tangible property, and it is also true that a corporation can purchase such real and personal estate as the purposes of the corporation require. R. S. 1879, sec. 706. But whether the statute, which authorized and required the defendant to *construct* a gravel road between certain points and along a specified and defined route, is satisfied or complied with by the purchase of a like road, located on the same route, presents a question about which there is some doubt or controversy. A literal reading or interpretation of the statute would compel us to decide the question in the negative. But when we consider the object of the law, and the evident intention of the legislature, a different answer ought to be given. The object of the law was not merely to provide for the construction of gravel roads, but also to maintain such roads for the use of the traveling public. If the defendant found that it was to its pecuniary advantage to buy a road already constructed, and extending along its chartered route, how could the public be prejudiced by such purchase? What would the state gain, or how could the public be benefited, by compelling the

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defendant to build another road in close proximity to the old road? Why should the state require the defendant to go to the useless expense of building a new road, which public necessity did not require, and the building of which would place an additional burden on the adjacent lands with no corresponding benefits? Morawetz, Corp. [2 Ed.] sec. 372; *Branch v. Railroad*, 3 Woods, 481; *Branch v. Jessup*, 106 U. S. 468; *Stockton, etc., Railroad Co. v. Stockton*, 51 Cal. 328. Mr. Morawetz in treating of this subject says: "The right of a railroad company to purchase or lease a line of road already constructed, or to make arrangements for the use of another company's tracks, depends upon the circumstances of the case. The object for which the company was formed must be considered. If a company is chartered for the purpose of constructing and operating a new railroad between given points, different from any existing line, it would be a departure from the charter to buy or lease a road already built between the two points. If, however, the company should be able to form the line of road contemplated by its charter, by constructing part of it and using a road already built to complete the line, there is no reason why it should not do so. The ultimate purpose of an ordinary railroad company is, not to build a railroad, but to carry on the business of common carrier by operating a railroad. If the company can obtain just the line of road, which its charter calls for, by purchase, lease or gift, every reason of policy indicates that it should be allowed to do so, rather than compel it to go to the unnecessary and wasteful expenditure of constructing a new railroad." Morawetz, Corp. [2 Ed.] sec. 372. This doctrine is fully supported by the authorities cited. In the case at bar the evidence shows that the road purchased by the defendant, and occupied by it at the date of the institution of this suit, was the kind of road which the defendant was authorized "to construct and own," and was

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located on the exact line and between the same points as the road called for in the defendants' articles of incorporation. Under these circumstances, we think the purchase by the defendant of this road was a substantial compliance with its charter, and that we are supported in this both by reason and the authorities cited. Whether the defendant procured a good title to all or only a portion of its road, presents another and different question, which cannot be inquired into in this proceeding. It is sufficient for the defendant to show that, at the time of the institution of this suit, it was in possession by purchase of a road located according to its charter, and, having done so, we do not think the state in this action can inquire into the character of the title or possession acquired by defendant by means of the purchase.

The plaintiff relies on case of *People v. Utica Ins. Co.*, 15 John. 358. In that case, the supreme court of New York sustained a *quo warranto* proceeding brought by the attorney general, which required the defendant to show by what authority it was doing a general banking business. The contention of the attorney general was, that the defendant was organized, and, only, authorized to do business as an *insurance company*, and was usurping the franchise of a banking corporation by *doing a banking business* in connection with the insurance business.

The distinction between that case and the one under consideration is very apparent. In the case cited, the defendant was certainly usurping or exercising a *franchise* not authorized by its charter. If, in the case under consideration, the defendant had been operating a *railroad* under its charter, then the cases would be analogous, and there would be on the part of the defendant a clear usurpation of corporate franchises not granted by its charter.

Plaintiff's counsel also think that the case of *People v. Geneva College*, 5 Wend. 217, is an authority

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sustaining this proceeding. In that case, the defendant was authorized by its articles of incorporation to establish and maintain a college at the town of Geneva, in the state of New York. The defendant, assuming to act in pursuance of its charter, established a medical school in the *city* of New York. The supreme court of New York held that this was a clear usurpation of a franchise not granted, and that *quo warranto* was the proper proceeding to have a forfeiture declared.

We think that case was properly decided, but we do not think there is any analogy between that case and this. If the defendant in the case at bar had built a branch gravel road and was assuming to collect toll under its charter for the main line, or if the defendant had constructed or built a gravel road in some other locality than the one specified in its articles of incorporation, then the two cases would be alike.

Judgment affirmed. Judge ROMBAUER concurs in this opinion. Judge THOMPSON dissents.

ROMBAUER, P. J., delivered the following concurring opinion:

I concur in the result reached in the foregoing opinion, although I confess the subject is not free from doubt. The trial court, whose judgment is presumptively correct, is in such cases entitled to the benefit of the doubt. I cannot find any analogous cases wherein *quo warranto* was upheld as the proper remedy, whereas the case of *People ex rel. Clauson v. N. & S. Plank Road Company*, 86 N. Y. 1, a case similar in its facts, does decide that injunction is a proper remedy.

In order to avoid any misunderstanding of my position, however, I desire to say, that I do not wish to be considered as expressing any opinion whatever as to the ultimate rights of the parties, whenever tested in a proper proceeding, and that I understand the foregoing opinion of the court as expressing none.

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FRUIN-BAMBRICK CONSTRUCTION COMPANY, Appellant, v. SALOME GEIST *et al.*, Respondents.

St. Louis Court of Appeals, November 5, 1889.

1. **Special Tax Bills.** In order to fasten a liability for street improvements upon abutting property, a strict compliance with the conditions imposed by the law authorizing the assessment of the property is necessary.

2. ———. Under the charter of St. Louis, which requires the unanimous approval of all the members of the board of public improvements in the case the owners of the major part of the property on the line of a proposed improvement shall remonstrate against the same, a finding by said board that a remonstrance in writing presented to it was not signed by the required major part of such owners is not conclusive.

3. ———. Under said charter provision it is not necessary that an owner should sign in person; his authorized agent may sign for him.

4. ———: RECORDS OF BOARD OF PUBLIC IMPROVEMENTS OF ST. LOUIS. Said charter impliedly requires said board to keep a record of its proceedings, and such record may be used as evidence to show non-compliance with said charter provision.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

Rowe & Morris, for the appellant.

(1) If the board believed that the remonstrance was not signed by a majority of the owners of property, it was not necessary to give the remonstrance any notice. Appellant's contention is that such finding of fact on the part of the board is final and conclusive upon all parties to this action; that the legislature made the board of public improvements the sole judges to determine the questions of fact involved in deciding whether

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the remonstrance is or is not signed by the owners of a major part of the property along the line of the proposed improvement. (2) There is no legal evidence in the record of a remonstrance signed by the owners of a major part of the property fronting on the improvement. There is no authority found for looking in the unauthorized record kept by the board of public improvements to ascertain whether they have conformed their conduct to the city charter in the recommendation of ordinances. *Railroad v. The Governor*, 23 Mo. 353; *City v. Foster*, 52 Mo. 515; *Ball v. Fagg*, 67 Mo. 484; *Ex parte Bedell*, 20 Mo. App. 129.

J. M. Holmes, for the respondents.

(1) The board had no power to recommend the ordinance, except by a unanimous vote of all of the members of the board. (2) The failure to send the remonstrance with the ordinance to the council invalidates the ordinance. (3) The council had no authority to pass the ordinance, as it was not recommended by a unanimous vote of all of the members of the board of public improvements. Respondents had the right to show that there was a remonstrance, signed by the owners of the major portion of the property in the block, duly presented and filed; that the ordinance did not receive a unanimous vote of all of the members of the board; that the remonstrance was not sent to the council with the ordinance. Dillon on Mun. Corps. [2 Ed.] sec. 639; [3 Ed.] sec. 800, and cases cited; *Kiley v. Oppenheimer*, 55 Mo. 374; *Leach v. Cargill*, 60 Mo. 316.

Biggs, J., delivered the opinion of the court.

The appellant is a business corporation and seeks to charge the property of the respondents with the amount of a special tax bill, for work done by the appellant in the improvement of an alley in the city of St. Louis. The work was done under a contract with the city, and the

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contract purports to have been entered into and authorized by ordinance No. 13798. The parties to the action waived a jury; the cause was submitted to the court, and, upon the evidence adduced, a judgment was entered for the defendants. No instructions were asked or given. The appellant in due time filed its motion for a new trial, and, the court having overruled it, the case was appealed to this court.

On the trial of the cause it was admitted that the block, through which the alley in question extended, contained seven hundred and sixty (760) front feet; it was also admitted that the tax bill was in due form, and that its payment had been demanded of the respondents prior to the institution of the suit.

The respondents denied a right of recovery on the tax bill, for the reason that, in the passage of the ordinance, the requirements of the charter had not been complied with, in this: That a remonstrance against the proposed improvement of the alley had been signed by the owners of more than one-half of the property in said block, and that it had been filed with the board of public improvements; that the ordinance was not recommended to the municipal assembly by the unanimous vote of all the members of the board of public improvements, and, further, that the "board" failed to send the remonstrance to the "assembly."

The respondents' evidence tended to prove the foregoing state of facts. The remonstrance was signed by Adolph Hellinger, who owned twenty-five feet, John T. Eberle, who owned one hundred and thirty feet, and by G. V. R. Mechin as the agent of the Bircher heirs (among whom were the respondents), who owned two hundred and thirty-nine feet. The ordinance was recommended by the board of public improvements by the vote of only five of its members, the president of the board being absent. The record fails to disclose the vote by which the ordinance was finally adopted by the

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municipal assembly. The respondents' entire testimony was objected to by the appellant, and exceptions were duly saved to its admission.

Section 14 of article 7 of the city charter, which authorizes the municipal assembly to pass ordinances for the construction or improvement of streets or alleys at the cost of the abutting owners, reads as follows:

"No ordinances for the construction or reconstruction of any street, alley or public highway of the city, shall be passed unless recommended by the board of public improvements, as hereinafter provided. The board may, of its own motion, and upon the petition of any reputable freeholder of property on any street, alley or highway, designate a day on which they will consider the improvement of such street, alley or highway, and shall give two weeks' public notice in the papers doing the city printing of the time, place and object of their meeting. On such day, if the owners of a major part of the property on the line of the proposed improvement shall remonstrate against the same, the board shall consider such remonstrance, and if said board shall by a unanimous vote of *all* its members approve such proposed improvement, they shall cause an ordinance for the same to be prepared, and report the same, with the reasons for their action and the remonstrance, to the assembly. If such majority of the property-owners fail to remonstrate, or shall petition said board for such improvement, the board may, by a vote of the majority of its members, approve the same, and shall cause an ordinance to be prepared and reported to the assembly therefor."

It is the well-settled law in this state that proceedings by municipal corporations, to compel the owners of land, abutting on a street or alley, to pay for improvements in front of their property, are *in invitum*, and a

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strict performance of all conditions imposed is necessary, in order to fasten a charge or lien on the property of the citizen. *Leach v. Cargill*, 60 Mo. 316; *Kiley v. Oppenheimer*, 55 Mo. 374; *City of Kansas, etc., v. Swope*, 79 Mo. 446.

The supreme court in case of *Leach v. Cargill*, *supra*, said: "It is well-settled law in this state, as well as elsewhere, that the power of the municipal authorities is exclusively confined to the limits prescribed by the charter, and such ordinances as are passed in conformity thereto." In the case of *Kiley v. Oppenheimer*, *supra*, the court in deciding the case, made use of the following language: "The ability of the city to create a lien on the property of one of its citizens, in the manner pointed out in the ordinance referred to, is founded not in any absolute or pre-existent right, but rests exclusively in an adherence to the method prescribed by ordinance, in pursuance of the authority contained in the charter."

And we think it is equally well-settled in this state, that one who contracts with a municipal corporation to do public work, by which the property of the citizen is to be charged with the expense, must ascertain if the ordinance, upon which the contract is based, is authorized by the charter, and has been adopted in the manner pointed out by the charter. The supreme court in the case of *Cheeney v. Brookfield*, 60 Mo. 53 said: "Those who deal with the officers of a corporation must ascertain, at their peril, what they will indeed be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act." Also in the case of *Keating v. City of Kansas*, 84 Mo. 415, the court in passing on the rights of a contractor, who had performed work under a defective ordinance, said: "Keating was bound to taken notice, at his peril,

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of the defective ordinance, when dealing with the officers of the defendant, and cannot urge against the city, in this suit, such defects or want of power in such officers."

It appears inferentially from the record that the board of public improvements decided that the remonstrance was not signed by the owners of a major part of the block, and the appellant contends that the finding of this fact by the board of public improvements was conclusive. We cannot consent to this. This was a jurisdictional fact and the decision of the board of public improvements, in the absence of an express legislative provision to that effect, would not be *conclusive*. 2 Dillon, Mun. Corp. [3 Ed.] sec. 800.

The tax bill made a *prima facie* case for the appellant, and presumptively the ordinance authorizing the improvement was valid (*City v. Gleason*, 15 Mo. App. 25); but it was perfectly competent for the respondents to show that the owners of the major portion of the land in the block *did sign* the remonstrance, and that, this being true, the board of public improvements *did not* recommend the ordinance to the "assembly" by the *unanimous vote* of all its members, and *did not* transmit the remonstrance to the "assembly," as required by the charter. If, as a matter of fact, the signers of this remonstrance represented, or had the right to represent, more than one-half of the property, then the municipal assembly had no power to pass the ordinance, unless it had been recommended by the unanimous vote of *all* the members of the board of public improvements. This is the strict letter of the law, and the respondents had the right to demand its most rigid application, when the appellant sought to charge their property with the value of work done by authority of this ordinance.

But the appellant insists that, as a matter of fact, the owners of a major part of the real estate in the block did not sign the remonstrance; that Mechin signed it as agent of the Bircher heirs, whereas the charter

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required the remonstrance to be signed by the owners themselves, and that authority to sign such a paper could not be conferred on an agent, It was admitted on the trial that Mechin was the agent of the Bircher heirs, and had control of the real estate belonging to them; the respondents' evidence also tended to prove that Mechin, as such agent, had authority to sign such documents for his principals. The appellant has cited no authorities in support of its position, and there is no principle of law known to us by which it can possibly be sustained.

It is claimed by appellant that the record of the proceedings of the "board of public improvements" was incompetent to prove the filing of the remonstrance, and the action of the board touching the recommendation of the ordinance to the municipal assembly, *first*, because the charter does not require the board of public improvements to keep a record of its proceedings, and, *second*, because such record cannot be used to show a departure from the forms prescribed by the charter in the passage of an ordinance.

We do not think this contention of the appellant can be sustained. It is true that the charter does not, in express terms, direct the board of public improvements to keep a record of its proceedings, but such a duty, by necessary implication, is imposed. The board of public improvements is a very important part or adjunct of the municipal government, and it is unreasonable to say that it was the intention that its proceedings should rest entirely *in pais*. Its duties and powers, as prescribed by the charter, are of such a character, that, from the very necessity of the case, the duty of keeping a full and complete record of its proceedings must be implied. We have already decided that it was the duty of the appellant, and of all other persons who contract to do public work, to see that the ordinance,

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authorizing the work was passed in the manner prescribed by the charter; if no record is to be kept by the board of public improvements, it will be readily perceived that the legal dangers or chances attending the business of the contractor would be very materially increased.

In support of the second proposition, the appellant relies on the cases of *Pacific Railroad v. The Governor*, 23 Mo. 353, and *Ball v. Fagg*, 67 Mo. 481. In the case at bar the fact inquired into was jurisdictional in its character, and not a mere failure to observe the forms required in the passage of ordinances, where the jurisdiction to pass the ordinance is conceded. When the remonstrance, signed by the owners of the major part of the real estate in the block, was presented to the board of public improvements, then the municipal assembly, in attempting to pass the ordinance, exercised a power not delegated, because the ordinance had not been recommended by the *unanimous vote of all* the members of the board. This distinguishes the case under consideration from the cases relied on by appellant; besides, the law of those cases has been practically overruled in the case of *State ex rel. v. Mead*, 71 Mo. 266.

It is also urged by counsel that if the finding of the board of public improvements, as to questions of fact, is not held to be conclusive, then it might happen that a jury in a suit on a tax bill against lot A. would find an ordinance to be valid, and another jury in a suit on another tax bill against lot B. in the same block would find the same ordinance to be invalid. This state of affairs might happen, if it was permissible for the court to submit the validity of an ordinance to the jury This cannot be done; it is the duty of the court in all cases to pass on the validity of a statute or ordinance.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed.

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ALVAH DEWEY, Respondent, v. JACOB LEONHARDT, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Practice, Trial:** NEW TRIAL. It is erroneous for a circuit court to attach to an order, granting the defendant a new trial, a condition requiring the defendant to give bond for the payment of any judgment thereafter rendered against him in the cause.

2. ——— : PLEADING. If, in an action for foreclosure of a mortgage under Revised Statutes, 1879, section 3297, the debt consists of three notes, the petition should contain a separate count for each note.

Appeal from the St. Louis City Circuit Court.—HON. JAS. E. WITHROW, Judge.

REVERSED AND REMANDED.

Lubke & Muench, for the appellant.

The court below found the motion to set aside the default and judgment a meritorious one. Its authoiity to impose terms on defendant is not arbitrary. The statute says a default may be set aside before final judgment "upon such terms as shall be just" (R. S. 3676); and that after final judgment the court may grant a new trial and "permit the pleadings to be amended on such terms as may be just." R. S. 3704. This language refers to costs, the time and manner of pleading, and the preparation for trial; and did not justify the order calling on defendant to give bond and security. The petition is defective in that the three notes are joined in one count. This defect is fatal, and can be taken advantage of by motion in arrest. *McCoy v. Yager*, 34 Mo. 134; *Clark v. Railroad*, 36 Mo. 202; *Hoagland v. Railroad*, 39 Mo. 457; *Scott v. Robards*, 67 Mo. 289. The petition is also defective, in that the

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cause of action for a judgment or decree of foreclosure is not stated in a separate count, as required by Revised Statutes, section 3512. *Henderson v. Dickey*, 50 Mo. 161.

George Bullock and *Wm. F. Woerner*, for the respondent.

The motion for a new trial was properly overruled. The court would have been justified in denying the defendant a new trial absolutely; if the court had the power (which cannot be doubted) to overrule unconditionally, then certainly defendant cannot complain that the motion was sustained conditionally. Although the three notes be joined in one count, the defect, if any, cannot be reached by motion in arrest. *Bank v. Dillon*, 75 Mo. 380–382; *Carrington v. Hancock*, 23 Mo. App. 299; *Baker v. Raley*, 18 Mo. App. 562; *Southern Co. v. Bamb*, 82 Mo. 242, 247.

Biggs, J., delivered the opinion of the court.

There was a judgment against the defendant, and the circuit court sustained a motion for a new trial upon the condition that the defendant would give a bond, to be approved by the court, for the payment of such judgment as might thereafter be rendered in the cause. The defendant refused to give this bond, and objected and excepted to the action of the court in annexing such a condition to its order. This, we think, presents a proper question for review, and if the action of the court in this respect was unauthorized, or if there has been a wrongful exercise of a judicial discretion by the court, then the judgment ought to be reversed.

The record presents other questions growing out of the refusal of the court to arrest the judgment, but the view, which we entertain of the action of the court respecting the motion for a new trial, dispenses with

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the discussion of them by us, except in an incidental way, as the errors (if any) were mere accidents of the trial, and are not likely to occur on a retrial.

The statute provides that after final judgment the circuit court may grant a new trial and permit the pleadings to be amended, etc., "*on such terms as may be just.*" R. S. 1879, sec. 3704. We do not think that this statute confers on the circuit court absolute or arbitrary authority to determine upon what terms or conditions it will sustain a motion for new trial. The extent of such authority or discretion is to be determined by a reasonable interpretation of the words of the statute, and cannot be made to depend on the mere opinion of the trial judge. In other words, the discretion is to be exercised in a judicial way and not arbitrarily. The words, "on such terms as may be just," refer to the payment of costs already incurred, the time within which pleadings must be amended or filed, and the date of retrial. Within this scope the discretion of the trial court is almost unlimited, and could only be interfered with in cases of manifest abuse.

The circuit court determined that the reasons urged by the defendant for a new trial were meritorious and justified the court in sustaining the motion, and, having so decided, we do not think the court had any right to withhold from the defendant his just rights under the law, unless he would give security for the payment of plaintiff's debt.

In view of the fact that there will probably be another trial, we have deemed it proper to indicate our opinion concerning a question of pleading involved in this case. This is a statutory proceeding to foreclose a chattel mortgage, and to obtain judgment against the defendant on three promissory notes. There is but one count in the petition. This statutory action is somewhat peculiar (R. S. 1879, sec. 3297), but we know of no good reason why the ordinary rules governing code

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pleading should not be applied to it. The statute provides for a general judgment against the mortgagee for the amount of the mortgage debt, and it also provides that all proceedings under the statute should be governed by the same law regulating other civil actions. If the ordinary rules of pleading are to govern, it will be readily conceded that the plaintiff's petition is not sufficient.

The judgment of the circuit court will be reversed, and the cause remanded. All the judges concur.

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ALBERT J. BRUMBACK, Respondent, v. ANNA WEINSTEIN *et al.*, Appellants.

St. Louis Court of Appeals, November 5, 1889.

Attachment: RIGHT TO WRIT OF. A writ of attachment cannot be sued out in aid of a suit in equity to charge the separate estate of a married woman. (*Frank v. Siegel*, 9 Mo. App. 467, *overruled.*)

Appeal from the St. Louis City Circuit Court.—HON. D. D. FISHER, Judge.

REVERSED AND REMANDED.

Albert Arnstein and *David Goldsmith*, for the appellants.

The circuit court erred in holding that the writ of attachment was properly sued out in this case. Such a writ does not lie in aid of an action to charge the estate of a married woman, but only in actions wherein a personal liability exists. *Gage v. Gates*, 62 Mo. 412; *Williams v. Railroad*, 8 Mo. App. 135; *Bachman v. Lewis*, 27 Mo. App. 81; *Hoover v. Gibson*, 24 O. S. 389 · 1 Wade on Att., p. 39.

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Taylor & Pollard, for the respondent.

An attachment will lie in aid of a suit in equity to charge a married woman's separate estate in personal property, where the demand to be enforced is, in fact, a charge upon such estate. *Frank v. Siegel*, 9 Mo. App. 467; *Turner v. Shaw*, 96 Mo. 28; *Dailey v. Singer Co.*, 88 Mo. 301; *Merrill v. St. Louis*, 83 Mo. 256; *Tinsley v. Savage*, 50 Mo. 141; *Smith v. Taylor*, 11 Ga. 22; *Barlow v. Delaney*, 36 Fed. Rep. 577; R. S., sec. 398.

Biggs, J., delivered the opinion of the court.

The record of this case presents but one question for our determination.

Anna Weinstein, one of the defendants, is a married woman, and at the date of the institution of this suit, and for some time previous thereto, was a sole trader, and owned in her own right, as her sole and separate property, a stock of merchandise. In conducting this business, she purchased of the plaintiff a bill of goods amounting to about five hundred dollars, and, at the expiration of the credit, failed and neglected to pay. Thereupon the plaintiff brought this action against her and her husband, by which he sought to have the amount due him declared a charge against the separate property of Mrs. Weinstein, and a decree for its sale to satisfy plaintiff's claim. At the same time and in aid of this equitable action, the plaintiff sued out a writ of attachment against the property of Mrs. Weinstein, and, by virtue of this writ, the sheriff seized a portion of the aforesaid stock of goods. The defendants gave a forthcoming bond for the property. The objection was made by Mrs. Weinstein in the circuit court that the writ of attachment was wrongfully issued and levied on her property, for the reason that she was a married woman, and this objection was presented and urged by motion to quash the attachment, by objection to any testimony

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on the trial of the plea in abatement, and finally by an instruction in the nature of a demurrer to the plaintiff's evidence on the plea in abatement. The judgment of the court on the plea in abatement was against Mrs. Weinstein, and her exceptions to the rulings of the court thereon having been properly saved, the legal question involved is properly before this court for review. After the court had disposed of the plea in abatement and sustained the attachment, there was a trial on the merits, which resulted in a decree for plaintiff charging the separate property of Mrs. Weinstein with the payment of the amount found to be due. Mrs. Weinstein also objected to any testimony on this branch of the case, and duly saved her exceptions to the action of the court in overruling the objection. The case is before this court on appeal.

The right to a writ of attachment, in aid of a proceeding to charge the separate property of a married woman with the payment of a debt, has been the subject-matter or much discussion by both the supreme and the appellate courts of this state, and has resulted in a direct conflict in the decisions. The first direct reference to the subject was by the supreme court in *Gage v. Gates*, 62 Mo. 417. The court in disposing of that case said: "It is obvious that, if the wife had a separate estate in the millinery establishment, that it was attachable neither for the debts of the husband nor of the wife; and it is equally obvious that such separate estate could only be reached by appropriate procedure in equity for that purpose, and not then, unless the wife had created a charge on her separate estate by such action on her part as would accomplish that end."

The question first came before this court in *Williams v. Railroad*, 8 Mo. App. 135, where it was held that an attachment against the property of a married woman was unauthorized, and that a sale under the writ would pass no title to the property sold.

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Then followed the case of *Frank v. Siegel*, 9 Mo. App. 467, in which this court asserted a contrary doctrine.

The last decision on the subject is *Bachman v. Lewis*, 27 Mo. App. 81, wherein the Kansas City court of appeals follows *Gage v. Gates*, *supra.*

The opinion of the supreme court in *Gage v. Gates* furnishes us with the law in the case at bar, and the decision of this court in *Frank v. Siegel* must be overruled.

It seems to be the well-settled law of this state and other jurisdictions that the issuance of writs of attachment is an exercise of special jurisdiction, and that such process can only issue in aid of an action at law. *Lackland v. Garesché*, 56 Mo. 267; *Guilhon v. Linde*, 9 Bosw. 601; *McPherson v. Snowden*, 19 Md. 197; *Buckley v. Lowry*, 2 Mich. 418; *Williams v. Gage*, 49 Miss. 777; *Curtis v. Steever*, 36 N. J. L. 304. While the decisions of other states, on account of a difference of the phraseology of the statutes, cannot be relied on to furnish a correct rule as to the kind of legal actions in which an attachment may be had, yet so far as our research has gone, the authorities all hold that it is a special statutory remedy, and that the jurisdiction must be exercised solely in courts of law and in aid of legal actions.

The character of action in this state, by which the obligations of a married woman, who owns separate estate, are enforced or collected, is not an open question. A court of law does not recognize the right of a married woman to bind herself by contract. It is only in courts of equity that the undertakings or obligations of a married woman are recognized as having any validity or efficacy, and even in a court of equity such contracts do not bind the "*femme covert*" personally, but are merely made the foundation for an equitable action, by which a charge is enforced against

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her separate estate, owned at the date of the contract. The decree in such a case must be strictly *in rem* and and not *in personam*. In *Davis v. Smith*, 75 Mo. 224, the supreme court in discussing the nature of such a contract said: "All that can be said of it is that it is an anomalous obligation, neither binding her or her estate, general or separate, but only constituting a foundation for a proceeding in equity by which her separate property may be subjected to its payment; and until a decree to that effect is rendered it is neither a lien nor a charge upon the estate." To the same effect is *Boatman's Saving Bank v. McMenamy*, 35 Mo. App. 198. It necessarily follows from the foregoing authorities, that a writ of attachment cannot rightfully issue in aid of a bill in equity to charge the separate estate of a married woman; and that the trial court erred in overruling Mrs. Weinstein's motion to quash the attachment, and also in overruling the demurrer presented by her to the plaintiff's evidence on the trial of the plea in abatement.

On the trial of the merits, Mrs. Weinstein also interposed an objection to the introduction of any testimony on the ground that she was a married woman, and that a writ of attachment could not properly issue against her. As we have shown, this objection was good on the trial of the plea in abatement, but just how such an objection could possibly avail the defendants on a trial of the merits, we are unable to perceive. The mere fact, that the plaintiff had improvidently or wrongfully procured a writ of attachment in aid of his suit, would not prevent him from obtaining a final decree against Mrs. Weinstein's property in the event the testimony showed that he was entitled to the relief sought. If the trial court had quashed the attachment, this would not have necessitated the dismissal of the plaintiff's action. An examination of the record satisfies us that the decree of the circuit court, so far as

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it made plaintiff's claim a general charge on Mrs. Weinstein's separate property, was fully justified by the plaintiff's evidence, and that, so far as this part of the decree goes, the judgment of the circuit court must be affirmed. But the action of the court in sustaining the attachment will be set aside, and held for naught.

It will therefore be ordered that the judgment in this case be reversed, and the cause remanded, with directions to the circuit court to quash the writ of attachment, and enter a decree making the amount of plaintiff's claim a charge on the separate property of Mrs. Weinstein mentioned in the original decree. All the judges concur.

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ELLEN LAVELLE, Appellant, v. P. F. STIFEL, Respondent.

St. Louis Court of Appeals, November 5, 1889.

1. **Husband and Wife.** In the case of the breach of a contract made with a married woman, owing to which she is prevented from earning money, the right of action vests in the husband alone, and this rule is not affected by Revised Statutes, 1879, section 3296, as amended in 1883.

2. ———. The wife has no right of action for such breach, even if, subsequent to the breach of the contract, she procures a divorce from her husband.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

Campbell & Ryan, for the appellant.

If the husband was properly a party in the first instance, then upon the divorce he was, as to the plaintiff's rights in this action, civilly dead. *Hunt v.*

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Thompson, 61 Mo. 148–51. But the right of action was in the plaintiff alone. Our laws regulating the rights of married women should be liberally construed. *McCoy v. Hyatt*, 80 Mo. 130; *Harris v. Bohle*, 19 Mo. App. 529; *State v. Mertz*, 14 Mo. App. 58. Although the contract of a married woman, having no separate estate, is, while executory, non-enforceable for want of mutuality, yet when she has executed her part thereof she may enforce its terms against the other party thereto, even though the latter be remediless as against her. *Walker v. Owen*, 79 Mo. 563; *Neef v. Redmund*, 76 Mo. 195; *James v. Chambers*, 18 Mo. App. 331; Cord's Rights of Mar. Wom., secs. 1045, 1046.

George A. Castleman and *D. Castleman Webb*, for the respondent.

This action is not upon an executed contract, but for the breach of an executory contract. The action is not for money earned, but for damages in not being enabled to earn what the plaintiff was entitled to. The plaintiff not having the capacity to contract, no cause of action accrued to her. *Neef v. Redmund*, 76 Mo. 196; *Lanier v. Ross*, 1 Dev. and Bat. 39; *Walker v. Owen*, 79 Mo. 576; *Schroyer v. Nickell*, 55 Mo. 267; *Kimball v. Silvers*, 22 Mo. App. 521; *McFerra v. Kinney*, 22 Mo. App. 554; *State to use v. Smit*, 20 Mo. App. 50; *Plummer v. Frost*, 81 Mo. 425; *Coughlin v. Ryan*, 43 Mo. 99; *Alexander v. Lydick*, 80 Mo. 341; *Heiman v. Fisher*, 11 Mo. App. 275; *State to use v. Bank*, 10 Mo. App. 482; *Harris v. Bohle*, 19 Mo. App. 529. The plaintiff had no cause of action. The right to damages for the breach of the contract did not vest in her, either at common law, or under the statute of 1883.

BIGGS, J., delivered the opinion of the court.

There was a trial in th s case before a jury, which resulted in a verdict and judgment for the plaintiff in

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the sum of twenty-one hundred and forty-five dollars. The defendant filed the following motion in arrest of judgment, to-wit: "Upon the face of the record in this case it appears that at the time of contract alleged, and the performance of the services alleged, that plaintiff was a married woman, and that she had no right to the proceeds of said contract, nor to damages for the alleged breach thereof, but that, under the law, her husband is the proper party to maintain this action."

The court sustained this motion and the plaintiff refusing to proceed or plead further, the cause was dismissed and final judgment entered for the defendant. The case has been brought to this court by plaintiff on appeal. The action of the court in sustaining this motion is the only thing complained of by plaintiff. As there is no dispute as to the facts, a question of law only is presented.

Plaintiff's action was at law, and she alleged in her petition that during her "coverture" she entered into a contract with the defendant which had been fully performed on her part; that by the terms of this contract, she was to go to Granite Bend in Missouri, and establish a "boarding house" of sufficient capacity to accommodate one hundred and fifty of the defendant's employes; that the defendant agreed to furnish the plaintiff that number of men to board during her stay; that she was to receive four dollars per week for each boarder; that in pursuance of this contract the plaintiff went to Granite Bend and established a boarding house of the capacity agreed on, and remained there from February, 1886, to September, 1886, and that during that time the defendant furnished an average of forty boarders only, to the plaintiff's damage in the sum of three thousand dollars. This was the alleged breach on which the plaintiff went to the jury.

The suit was first begun in the names of the plaintiff and her husband, but before the trial the plaintiff

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obtained a divorce, and plaintiff then filed an amended petition in her individual name, in which she averred that, at the time the contract was made, she was acting as a "*femme sole*" and that the contract was made and performed by her, separate and apart from her husband. In support of this last allegation, the plaintiff's evidence tended to prove that, at the time she entered into the contract with the defendant, she was living apart from her husband, and had previously been engaged in the business of keeping boarders; that she was possessed of a separate estate, and in carrying out her contract with the defendant she had been compelled to expend about eight hundred dollars of her own money in purchasing additional furniture, materials, etc., necessary for conducting the business in a proper way.

The motion in arrest of judgment, when properly interpreted does not, as contended by the plaintiff, go to the non-joinder of plaintiff's husband, but it challenges the right of the plaintiff to maintain this action under any circumstances. In other words, the defendant denies the right to institute the action in the first instance, in the joint names of husband and wife, and in this we think the defendant is supported by the common-law authorities. This is not an action which, by the rules of the common law, could be maintained jointly by husband and wife; if so, the right to continue the action after divorce might be held to devolve on the wife alone, she being the meritorious cause of the action. *Hunt v. Thompson*, 61 Mo. 148. Such a case is presented when a joint action has been brought by the husband and wife on a note or bond made payable to both, or when suit has been instituted by the husband and wife on a bond or note executed to the wife prior to her marriage. In such cases the right of survivorship belongs to the wife.

This right of joint action and survivorship has been sustained in an action for work done by the wife alone,

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where the promise was to the wife and the husband assented by bringing an action on the promise. *Buckley v. Collier*, 1 Salk. 114; *Brashford v. Buckingham*, 2 Croke's Rep. 77. There is, however, no common-law authority within our knowledge, that goes so far as to hold, that an action like the one under consideration can be instituted jointly by husband and wife. The theory of the common law is that the wife is the servant of the husband, and that the latter is entitled to demand and receive all money due for the labor of the wife, and all damages arising out of a breach of contract in reference thereto or touching any business conducted by her. As we have seen, the rule of procedure, when the earnings of a married woman are the subject-matter of litigation, permits a joint action by husband and wife for the recovery of the value of her personal labor, and the right of survivorship would exist; but this only applies to wages already earned. We know of no case that has extended this right to a suit for a damages resulting from a violation of such a contract as forms the basis of this action. The case of *Saville v. Sweeny*, 4 B. & Ad. 514, states the common-law rule very clearly. The plaintiffs, who were husband and wife, lived apart, and the wife kept a boarding house; they brought an action for slander for words spoken, which were calculated to injure the business carried on by the wife. The court held that, as the words were actionable only concerning the business, the damages were in law the husband's only, the wife should not have been joined.

When we apply the principle of this cause to the case at bar, it will be readily perceived that plaintiff's action is without warrant under common-law procedure. The damages sought were special damages growing out of the violation of contract, and belonged to the husband alone, the wife having no interest in them.

But counsel for plaintiff urge that section 3296, of the Revised Statutes, as amended in 1883, affords

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authority for the prosecution of this action by the plaintiff. This section as amended reads as follows: "Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife; provided, that said personal property shall not be deemed to have been reduced to possession by the husband, by his use, occupancy, care or protection thereof; but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit; but such property shall be subject to execution for the payment of the debts of the wife contracted before marriage, and for a debt or liability of her husband, created for necessaries for the wife or family; and any such married woman may, in her own name and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a *femme sole;* provided, any judgment for costs in any such proceedings, rendered against any such married woman, may be satisfied out of any separate property of such married woman subject to execution."

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This position assumed by the plaintiff's counsel cannot be maintained, unless a fair construction of the statute would make the claim for special damages, arising out of the breach of the contract by defendant, the separate property of the plaintiff.

The only object of the statute was to declare that certain property, therein designated, should thereafter become the separate estate of married women. This would seem to be the only purpose of the statute as originally enacted. It did not attempt to enlarge or extend the right of a married woman to make contracts; her power in that respect remained as before. Now it cannot be said that the special damage, arising out of an alleged violation of this contract by the defendant, became the separate property of the plaintiff, unless made so by the words "rights in action" found in the statute. The words "rights in action" as used in the statute mean "choses in action," and the legislature merely intended to enact, that what was then and is now recognized as the "choses in action," of a married woman, should thereafter become her separate estate, unless reduced to the possession of the husband by the written consent of the wife. Previous to this statute, the common-law rule was in force by which the husband could at his pleasure become the absolute owner of of his wife's "choses in action," and this change of ownership was generally held to be brought about by any action on the part of the husband indicating such an intention. The amendment of 1883 merely enables a *femme covert* to assert her property rights and enforce her contracts concerning her separate personal estate in courts of law. Previous to this enactment, her title to personal property, and her right to protect or enforce contracts in reference to it, were only recognized in a court of equity.

Our conclusion is that the statute relied on by plaintiff has not afforded her a remedy, and that the

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action of the trial court in arresting the judgment was right. It seems that the defendant also perfected an appeal, but just why he should object to a final judgment in his favor, we are unable to perceive. We have, therefore, in deciding this case, treated the defendant as a respondent, as the conclusion we have arrived at did not require us to do otherwise. With the concurrence of the other judges, the judgment of the circuit court will be affirmed.

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JOHN MEYERS, Appellant, v. WILLIAM BOYD *et al.*, Respondents.

St. Louis Court of Appeals, November 5, 1889.

1. **Attachment: PRACTICE IN CASE OF.** In an attachment proceeding, instituted before a justice of the peace and taken on appeal by the defendants to the circuit court, the defendants may file a plea in abatement in the circuit court, though such plea was not made before the justice.

2. **——.** A written plea in abatement, filed with the justice and transmitted with the other papers in the case to the circuit court on such appeal, but not noted on the justice's docket, may be treated by the circuit court as putting in issue the grounds of attachment.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

D. Castleman Webb, for the appellant.

The defendants waived their right to a trial of the plea in abatement, because the docket entry of the justice shows that no such plea was filed in the court, and

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the record in the circuit court shows that no such plea was filed in that court. The court below erred in instructing the jury to find for the defendants. There was some evidence that the defendants were about fraudulently to convey or assign their property or effects, so as to hinder or delay their creditors. *Desberger v. Harrington*, 28 Mo. App. 632; *Rainwater v. Faconesowich*, 29 Mo. App. 29; *Nelson Dist. Co. v. Vossmeyer*, 25 Mo. App. 579; *Kramer v. Wilson*, 22 Mo. App. 175; *Singer v. Goldenberg*, 17 Mo. App. 565; *Estes v. Fry*, 22 Mo. App. 90; *State v. Distilling Co.*, 20 Mo. App. 25; *Bank v. Overall*, 16 Mo. App. 514; *Groske v. Bardenheimer*, 15 Mo. App. 358; *Hubbard v. Lucas*, 71 Mo. 506; *Wiles v. Robinson*, 80 Mo. 50; *Shelley v. Booth*, 73 Mo. 75

James P. Dawson and *Frank Hicks*, for the respondents.

The defendants did not waive their right to plead in abatement. *Henry v. Lane*, 2 Mo. 201; *Phillips v. Bliss*, 32 Mo. 427; *Moore v. Hutchinson*, 69 Mo. 429; *Compton v. Parsons*, 76 Mo. 455; *Hubbard v. Quisenberry*, 28 Mo. App. 20. There was no evidence sufficient to take the case to the jury, and the ruling of the circuit court in taking the case from the jury was correct.

Thompson, J., delivered the opinion of the court.

This action was commenced before a justice of the peace by attachment. The grounds of the attachment were three-fold: *First.* That the defendants were about fraudulently to convey and assign their property or effects so as to hinder or delay their creditors. *Second.* That they were about fraudulently to remove, sell and dispose of their property and effects so as to hinder and delay their creditors. *Third.* That the defendants have failed to pay the price value (*sic*) of the articles which by contract they were bound to pay for upon delivery.

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The amount of the plaintiff's demand was one hundred and ninety-three dollars and thirty-five cents. The attachment was levied upon seven horses belonging to the defendants. On the twelfth of June, 1888, the case was finally called for trial before the justice, and, according to his transcript, both parties announced themselves ready for trial. The justice's transcript then recites: "Plaintiff put a witness on the stand who is sworn and part of his testimony heard. Defendant then admits the debt and asks to file plea in abatement. Plaintiff objects to the filing of any plea in abatement after his witness was sworn. The court continued the case to June 16, 1888, by consent of both parties. On said day plaintiff's objections are sustained and judgment for the plaintiff is rendered in the sum of one hundred and ninety-three dollars and also for the costs of suit, by default," etc.

From the judgment so rendered an appeal was prosecuted to the circuit court. Among the papers transmitted by the justice to the circuit court was a plea in abatement, denying the allegations of fact in the affidavit for attachment, which plea was duly verified by the affidavit of one of the defendants. This plea purports to have been sworn to and subscribed before the justice on the thirteenth day of June, which was the day after the trial was commenced, as above stated. It is also marked: "Filed, June 13, at 10 a. m.," and this file mark is signed by the surname of the justice.

When the cause was called for trial anew in the circuit court, counsel for the plaintiff objected to the trial proceeding on the plea in abatement, for the reason that the transcript of the justice showed that no plea in abatement had been filed in the justice's court, and that the record in the circuit court showed that no such plea had been filed in that court,—arguing that the defendants, by failing to file such a plea, had waived his right to a trial of the plea in abatement. The court overruled this objection and the plaintiff excepted.

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The trial then proceeded on the issues made by the plea in abatement. At the close of the evidence the court directed the jury to find the issue in favor of the defendants, and their verdict was returned and entered accordingly, and judgment dissolving the attachment was thereupon entered. From this judgment the plaintiff prosecutes the present appeal to this court, as the statute allows him to do.

Two errors are assigned: *First.* That the circuit court erred in proceeding to the trial of the plea in abatement, it having been waived. *Second.* That the circuit court erred in directing the jury to find the issue made by the plea in abatement for the defendant at the close of the trial. We perceive no error in either of these rulings.

I. It is a settled rule of procedure in this state that when a cause comes by appeal from a justice's court to the circuit court it is to be tried *de novo.* Revised Statutes, 1879, section 3052. It is equally settled, as a general rule, that the defendant may, on the trial anew in the circuit court, avail himself of any defense which he may have, whether he has offered it in the justice's court or not. *Hall v. Mills*, 11 Mo. 217; *Phillips v. Bliss*, 32 Mo. 427; *Compton v. Parsons*, 76 Mo. 455. Under this rule he may, in a suit commenced by attachment, file a plea in abatement for the first time in the circuit court. *Phillips v. Bliss, supra; Hubbard v. Quisenberry*, 28 Mo. App. 20, 26. It was therefore of no importance whether the plea in abatement had been made before the justice or not.

Nor do we perceive any force in the argument that, because the justice did not note on his docket the filing of the plea in abatement, it is to be regarded as never having been filed before the justice. Section 471 of the Revised Statutes, relating to attachments before justices of the peace, provides that, "in all cases where property or effects shall be attached, the defendant may put in

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issue, by a verbal plea, in the nature of a plea in abatement, on oath, the substance of which shall be noted by the justice on his docket, the existence of the facts alleged in the affidavit on which the attachment was sued out." But this does not at all negative the conclusion that the defendant may file a formal plea in abatement before the justice, verified by affidavit; that the justice may transmit the same to the circuit court together with the other papers in the case; and that the circuit court may treat it as putting in issue the existence of the facts alleged in the affidavit for the attachment, although the justice may not have seen fit to note it on his docket.

II. Upon the second assignment of error, we deem it sufficient to say that we have read the testimony and see no substantial evidence on which the circuit court would have been warranted in submitting to the jury the issues raised by the plea in abatement. Fraud, indeed, as has been argued, is, in many,—perhaps in most cases,—provable only by circumstantial evidence. But it does not follow from this that a jury can be allowed to infer fraud without evidence of circumstances warranting the inference. The rule is the contrary. Right acting is presumed. Fraud is not presumed in the absence of evidence, but must be proved. *Stewart v. English*, 6 Ind. 176; *Norton v. Kearney*, 10 Wis. 443, 451; *Ahlman v. Meyer*, 19 Neb. 66. The mere fact that a debtor has not paid an admitted debt after being frequently dunned, and that he has offered to sell for cash some of his personal property, does not, we think, warrant the inference that he is about fraudulently to convey and assign his property so as to hinder or delay his creditors, or that he is about fraudulently to remove, sell or dispose of it for the same purpose.

The judgment of the circuit court will accordingly be affirmed. All the judges concur.

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L. E. GREEN *et al.*, Respondents, v. PACIFIC EXPRESS COMPANY, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Express Company:** LIABILITY OF. When goods, forwarded by the owner by express, are refused by the consignee, and the express company promises to return them to the consignor, but negligently fails to return them in proper time, the consignor is entitled to recover from the company the damages thus occasioned to him.

2. ———. The claim for such damages is based upon the contract for the return of the goods, and not upon the original contract of shipment, and is therefore not affected by a clause in the latter contract, requiring claims arising from it to be made in writing within sixty days from its date.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

Albert C. Davis, for the appellant.

The instructions given for respondents do not correctly state the law. Respondents cannot refuse to receive the goods, even if tendered back to them in an unreasonable time, and thereafter sue for full value of the same. *Tucker v. Railroad*, 50 Mo. 385; *Ranken v. Railroad*, 55 Mo. 167, 171; *Faulkner v. Railroad*, 51 Mo. 311; *Glascock v. Railroad*, 65 Mo. 589; *Sturgeon v. Railroad*, 69 Mo. 569; 2 Redfield on Railways, p. 14; *Shaw v. Railroad*, 5 Rich. [S. C.] 462; Hutchinson on Carriers, sec. 328; *Tanner v. Railroad*, 53 Pa. St. 441; *Scoville v. Griffith*, 12 N. Y. 509, 518; *Hackett v. Railroad*, 35 N. H. 390. This claim is barred by the terms of the contract, because it was not made in time, in writing, and accompanied by the receipt. *Rice v.*

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Railroad, 63 Mo. 314; *Dunn v. Railroad*, 68 Mo. 268; *Davidson v. Railroad*, 76 Mo. 514; *Massengale v. Tel. Co.*, 17 Mo. App. 257; *Brown v. Railroad*, 18 Mo. App. 568; *McBeth v. Railroad*, 20 Mo. App. 445; *Thompson v. Railroad*, 22 Mo. App. 321.

H. M. Wilcox and *G. H. Ten Broek*, for the respondents.

The contract, under which the goods were carried from St. Louis to Arkansas City, was completed and terminated, when the goods arrived at their destination, and the consignee was notified thereof. It cannot be denied that appellant, on April 18, 1887, agreed and undertook to return the goods to St. Louis. This agreement was made and undertaken after the shipping contract had terminated. It was an entirely new agreement, whereby appellant undertook the return of the goods subject to no condition whatever. The instruction given for the respondents was proper.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace to recover damages, alleged to have been sustained by the plaintiffs through the negligent failure of the defendants to return to the plaintiffs two boxes of millinery goods, which the plaintiffs had shipped to a customer at Arkansas City in the state of Kansas, and which goods had been declined by the consignee. The statement filed before the justice sets out the ground of action at considerable length, and is in substance a declaration upon a promise of the defendant, the Pacific Express Company, to return the goods, and a breach of that promise on the part of the company. At the close of the statement there is an averment that "if defendants had returned said goods immediately after said order for the return of said goods was given,

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plaintiffs would have received the same before the season of such goods had expired." Inferentially, therefore, the *gravamen* of the complaint is *delay* in returning the goods according to the alleged promise, and not a total failure to return them.

Wells, Fargo & Company, a corporation, were joined as defendants; but the plaintiffs took a non-suit as to them. In the circuit court the trial took place without a jury, and resulted in a finding and judgment in favor of the plaintiffs and against the Pacific Express Company.

The substantial facts shown in evidence at the trial were that on the twenty-sixth of March, 1887, the plaintiffs shipped two boxes of early spring ladies' hats, for sale on approval, to Mrs. Hollenbeck at Arkansas City, in the state of Kansas, by the Pacific Express Company, taking the usual receipt of the company therefor in a book of the company furnished to the plaintiffs for the purpose of taking and preserving such receipts. The goods went forward to Arkansas City, in Kansas, and there remained until the eighteenth of April, when the plaintiffs received by mail from Mrs. Hollenbeck a notification that she declined to receive the goods. Thereupon the plaintiffs requested the Pacific Express Company to return the goods to the plaintiffs, explaining to them at the same time,—as their evidence tends to show and as the defendants' evidence does not distinctly deny,—that unless the goods should be returned by the first of May the season for their sale would be past and they would be worthless. This the agent of the company promised to do. There is a town in the state of Arkansas named Arkansas City, and the agent of the company by mistake directed the order for the return of the goods to an agent of the connecting express company of the Pacific Express Company at that place. No attention was paid to this direction by the agent of the connecting carrier at Arkansas City in Arkansas. If

such attention had been given to the direction, it would have resulted in the early communication to the agent of the Pacific Express Company at St. Louis of the fact that the goods were not in the hands of their correspondent at Arkansas City in Arkansas. The matter thus rested until the twenty-ninth of April, when Wells, Fargo & Company sent notice to the agent of the Pacific Express Company at St. Louis, to the effect that the goods remained in their hands at Arkansas City in Kansas, and were refused by the consignee. Thereupon the agent of the Pacific Express Company communicated this notice to the plaintiffs and applied for their written direction as to what should be done with the goods to be endorsed on this notice in compliance with the rules of the company. The plaintiffs endorsed their direction that the goods should be returned. This endorsement was made on the thirtieth of April. The goods were not returned until the seventh of May, when they were tendered to the plaintiffs, not by the Pacific Express Company, but by the American Express Company, to which company they had, it seems, been delivered by Wells, Fargo & Company for the purpose of being returned. The plaintiffs declined to receive the goods, on the ground that the season for their sale had passed by, and that they were worthless. The evidence is to the effect that the distance between St. Louis and Arkansas City in Kansas is about a day and a half, and it fairly leads to the inference that with reasonable diligence, the order given by the plaintiff on the eighteenth of April for the return of the goods might have been executed in the space of four days.

I. The court gave a comprehensive instruction, reciting the foregoing facts and concluding by a declaration that if the Pacific Express Company, by the exercise of ordinary care and diligence, might have returned the goods to the plaintiff on or before the first of May, but negligently and carelessly failed and neglected to

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do so, by reason of which negligence and carelessness the plaintiffs have been damaged, they are entitled to recover. The giving of this instruction is the first error assigned by the defendant. We see no ground on which its propriety can be challenged. We do not deem it necessary to set it out in terms. It is sufficient to say that we understand it to be aptly drawn, and to be a correct application of the law to the hypothetical state of facts recited in it, which the evidence left undisputed, and which were substantially the same as those above recited.

One of the grounds on which the instruction is challenged is that a shipper cannot refuse to receive the goods, even if tendered back to him in an unreasonable time, and thereafter recover their full value. The instruction announces no such proposition, but concludes by the recital that, if the court finds the facts stated, the plaintiffs are entitled to recover such sum as the court believes from the evidence the plaintiffs have been damaged thereby.

Nor is it necessary to question the proposition, made in argument on behalf of the appellant, that if the goods are tendered by the carrier in proper time, place and manner to the owner or consignee, and receipt thereof is refused, the carrier is released as such, and is thereafter responsible only as an ordinary bailee. This proposition is not at all questioned by the instruction given by the court, nor is it at all relevant to the case before us.

II. The contract under which the goods were shipped contains this clause: "And it is further agreed that the said Pacific Express Company shall not be liable for any claim, of whatsoever nature, arising from this contract, unless such claim shall be presented in writing sixty days from the date hereof, in a statement to which this receipt shall be annexed." There was no evidence that such a claim had been presented in writing. An instruction was tendered by the defendant

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and refused by the court, to the effect that, unless the court found that such a claim had been presented in writing, the plaintiffs could not recover. The court was right in this ruling. The plaintiffs are not suing on the original contract of shipment, but they are suing on the subsequent parol promise of the defendant, made on the eighteenth of April, after the plaintiffs had received notice from the consignee that she refused to receive the goods, to return them to the plaintiffs. The claim of the plaintiffs is therefore not a claim "arising from this contract," that is, from the original contract of shipment, but a claim arising from the subsequent undertaking of the defendant. The limitation in the original contract is therefore not applicable to this action.

The judgment of the circuit court will be affirmed. All the judges concur.

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SARAH E. LEIGH AND JAMES A. LEIGH, her Husband, *et al.*, Respondents, v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY OF SPRINGFIELD, MASSACHUSETTS, Appellant.

St. Louis Court of Appeals, November 5, 1889.

1. **Practice, Appellate.** A judgment should not, when appealed from, be affirmed upon a technical and doubtful question of pleading, which does not appear to have been distinctly raised in the trial court, and which, if so raised, could have been obviated by an amendment.

2. **Practice, Trial:** PLEADING. When a petition states several things conjunctively, the denial thereof in the answer, if special, must be disjunctive.

3. **Insurance:** PROOFS OF LOSS. Compliance with a condition in a policy of fire insurance requiring proofs of loss is a condition precedent to a recovery under the policy, unless a waiver of it has been shown.

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4. ——— : ———. The fact that the policy requires a certificate of the nearest justice of the peace as a part of the proofs, and that the nearest justice refuses to give the requisite certificate, does not dispense with the necessity for proofs of loss; but, *semble*, the capricious refusal of the justice to give the certificate would not prevent a recovery, if the requirement for proofs were otherwise complied with, and the certificate of another justice obtained.

5. ——— : WAIVER OF PROOFS. A waiver is not established by proof that immediately after the fire, and after the company had knowledge of it, the adjuster of the company visited the scene of loss and saw the assured, nor by the fact that, after the expiration of the time for the delivery of the proofs, the company made an offer of compromise to the assured.

Appeal from the Stoddard Circuit Court.—HON. JOHN G. WEAR, Judge.

REVERSED AND REMANDED.

George N. Boughton, for the appellant.

The only issue made by the pleadings was: Had the plaintiffs performed their part of the contract? They aver in their petition that "they have faithfully kept and fulfilled all the conditions and requirements in the said contract of insurance on their part." As to the giving notice of the fire no point is made, appellant admitting that it had due notice. But the other requirements of the policy as to proof of loss and a certificate of the magistrate, not having been waived by the company, ought to be substantially complied with before a recovery can be had. Wood on Fire Ins., p. 927; *Noonan v. Ins. Co.*, 21 Mo. 81; *Sims v. Ins. Co.*, 47 Mo. 54; *Erwins v. Ins. Co.*, 24 Mo. App. 145; *Blosson v. Ins. Co.*, 64 N. Y. 162.

James Carr, for the respondents.

No issue was made by the appellant's answer. The answer is not a general denial; and it is not a specific

denial of performance of conditions. Stephen on Plead., 246; Chitty on Plead., 645; *Doll v. Goode*, 38 Cal. 287; *Young v. Catlett*, 6 Duer., 437; *Byington v. Hogan*, 58 Mo. 509; *Wood v. Whiting*, 21 Barb. 190; *Wing v. Dugan*, 8 Bush, 583. If the court shall be of opinion that there was an issue of fact in this case, then the court below, sitting as a jury, passed on the facts and found them in favor of the respondents.

THOMPSON, J., delivered the opinion of the court.

This is an action on a policy of fire insurance. The plaintiffs had a verdict and judgment, and the defendant prosecutes this appeal. The error assigned is that the court erred in refusing to take the case from the jury, at the close of the plaintiffs' evidence. No evidence was offered for the defendant. The plaintiffs seek to avoid the force of this assignment of error, by raising the argument in support of the result reached in the trial court that the plaintiffs' right of recovery stood admitted on the pleadings.

I. We shall first get this question of pleading out of the way. The petition avers that the plaintiffs "have *faithfully* kept and fulfilled all the conditions and requirements in the said contract of insurance on their part." The answer consists of a denial of this paragraph of the petition in the words in which it is averred, and of nothing more. The entire answer is as follows:

"Now comes the defendant by its attorney, and, for answer to plaintiffs' petition, denies that plaintiffs have faithfully kept and fulfilled all the conditions and requirements of the contract of insurance referred to in said petition." The argument put forth in favor of the view of the plaintiffs is that the word "faithfully" as used in the petition is a mere intensive word, having no legal meaning or effect; but that a denial of the paragraph of the petition containing this intensive word, in the very language in which the paragraph stands in the petition,

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amounts to a denial of the intensive word only; that is, that the denial in this case is not a denial of the allegation that the plaintiffs have kept and fulfilled the conditions and requirements of the contract, but only a denial that they have *faithfully* kept and fulfilled the conditions and requirements of the contract. We agree with much of the able argument that has been put forth in behalf of this view; and if the question had been distinctly raised on demurrer and overruled, we might feel inclined to sustain the respondents' position. We quite agree with the position that, as a rule of pleading, where several things are averred by the plaintiff *conjunctively*, they cannot under our code be denied conjunctively, but that they must be denied *disjunctively;* for a conjunctive denial would not, according to the fair interpretation of language be what our statute requires in the case of a special denial, "a *specific* denial of *each* material allegation of the petition." R. S., sec. 3521. But as the word "faithfully" can hardly be said to be an allegation, but is a mere expletive word, we think that it can hardly be regarded as a fair interpretation of this answer to hold that it is merely a denial of this expletive word. It is true even under the code that a pleading must be interpreted in doubtful cases most strongly against the pleader. But this rule does not require an unreasonable or unfair interpretation. The paramount rule of interpretation applies, we think, to pleadings as much as to statutes, to wills and to contracts, that they are to be interpreted so as to give effect to the *intent of the author*, where that intent fairly appears in the language used. We think that it is fairly to be inferred in this case, from the language used, that the defendant intended to traverse this particular allegation of the petition in the very terms in which it had been made, and to rest its defense solely upon the issue that the plaintiffs had not complied with the conditions and requirements of the policy on their part.

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While it is true, as a general rule, that any reason may be urged in an appellate court, which is good in itself, *in support* of the judgment which is appealed from, yet we think that a judgment ought not to be affirmed upon a technical and doubtful question of pleading which does not appear to have been distinctly raised in the trial court, when, if it had been so raised, it could easily have been obviated by an amendment—in this case by striking out a single word.

II. This brings us to the appellant's assignment of error, and it is obviously well taken. The policy of insurance upon which the action is brought contains a clause, usual in such policies, requiring the person sustaining loss or damage by fire "forthwith to give notice of said loss in writing to the company," etc., and, "as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating," etc. No proofs of loss were ever rendered by the plaintiffs in this case. The well-known rule is that a condition in a policy of fire insurance requiring proofs of loss is a condition precedent to the right to maintain an action upon the policy, and if the condition is not complied with such an action must fail, unless the condition has been waived by the underwriter. *Noonan v. Hartford Fire Ins. Co.*, 21 Mo. 81; *Sims v. State Ins. Co.*, 47 Mo. 54.

As no such proofs were furnished in this case, the only remaining question is whether there was any evidence tending to show a waiver of them; for if there was no such evidence then the court erred in submitting the case to the jury. The entire evidence in the case consisted of the policy, supplemented by the following testimony :—

James A. Leigh, one of the plaintiffs, testified as follows : "A few days after the fire, I think eight or ten, an adjuster came to see me. He did not say much of anything, but said that he had seen the ground where the fire was. Mr. Boughton was the agent of the company at the time of the fire, but not when the policy was

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issued. He told me that he had notified the company of the fire. The house burned was, I suppose, one hundred and fifty or two hundred feet from where Mr. Boughton lived. I applied to the nearest justice of the peace, J. R. Wilson, for a certificate of the loss, but he would not give it. Do not know that he gave any reason; only he said he had heard that the house was set on fire, or something to that effect. He would not tell me who had told him so, or how he heard it. I then asked him to make an affidavit that the house was fraudulently burned, but he refused to do so. Some time last spring the state agent of defendant offered to pay five hundred and fifty dollars to settle the matter."

H. N. Phillips testified as follows: "Some two or three months ago the state agent of defendant came to see me at Malden, in regard to their loss, and said to me that he would pay five hundred and fifty dollars to settle the loss. I referred him to Colonel Kitchen, of Dexter."

George N. Boughton testified as follows: "I was agent of defendant at the time this house was burned. I notified the company by mail the same night. I think it was eight or ten days after the fire before the adjuster came."

This was all the evidence in the case.

We do not suppose that the mere fact of the refusal of the person who happened to be the nearest justice of the peace, to give the certificate required by the terms of the policy, would prevent the plaintiffs from recovering, if they had otherwise complied with the terms of the policy in regard to furnishing proofs of loss; for although, as held in *Noonan v. Hartford Fire Insurance Co.*, 21 Mo. 81, this condition in a policy in regard to the certificate of the nearest magistrate or notary public as to the fairness of the loss is a condition precedent in the same sense in which the furnishing of proofs of loss is a condition precedent to the right of the assured to recover on the policy,—yet we do not

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suppose that it is a condition precedent in such an absolute sense that the capricious refusal of a magistrate or notary to furnish the certificate would bar recovery for a loss, where the other conditions entitling the assured to a recovery were present. But the refusal of the magistrate or notary to give such a certificate does not, on any ground which occurs to us, excuse the assured from getting the certificate of another officer, or in otherwise complying with the terms of the policy, by furnishing proofs of loss, and giving a description of the same as required by the contract.

Nor do we rest our decision at all upon the question of the failure of the plaintiffs to give *notice* of the loss; for the evidence shows that the defendant's agent gave immediate notice of the loss; and it is a general rule of law that a requirement for the giving of notice is dispensed with where the party entitled to be notified has previous knowledge. Notice in such a case would be nugatory.

Waivers of proofs of loss are generally predicated upon a ground analogous to that which supports an estoppel *in pais; while the time was open* within which proofs of loss, under the terms of the policy, might have been furnished, the insurer must have done something which would fairly lead the assured to believe that proofs of loss would not be required. Certainly nothing of this kind was done in this case. The defendant's adjuster visited the scene of the loss and had some conversation with one of the plaintiffs, which conversation is not given; but nothing came of his visit—there was no adjustment—no agreement at that time to pay the loss, or to pay any particular sum. So far as his visit is concerned, in connection with the question of waiver, the case stands as though it had not taken place.

Then, as to the subsequent promises to pay the sum of five hundred and fifty dollars. These promises took

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place long after this action was brought and some three years after the happening of the loss. It is a well-understood rule of procedure that a plaintiff must recover upon the state of facts existing at the time when he brings his action. The loss took place in May, 1885. This action was brought in August of the same year. This trial did not take place until the September term, 1886. The evidence of the witnesses was that this offer to pay five hundred and fifty dollars took place some time in the preceding spring. It was therefore at most a mere offer to compromise, and was no waiver of any legal rights which the defendant had.

A mere offer to pay less than the sum sued for cannot be regarded as a waiver of the condition of the policy touching proofs of loss, or of any other legal right which the defendant may have. It seems to me that the language of SHARSWOOD, J., in a case in Pennsylvania, expresses the law applicable to this subject: "To constitute a waiver, there should be shown some official act or declaration by the company, *during the currency of the time*, dispensing with it,—something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. * * * After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract." *Beatty v. Insurance Co.*, 66 Pa. St. 9. Quoting with approval this language, it was said by ELLISON, J., in a case in the Kansas City court of appeals: "The clear reason for this is, that within the time limited the company's conduct may be such as to lead the assured to believe no compliance, as to time, would be required or deemed material, and, but for such conduct, he would have rendered full compliance. But if the specified time has elapsed without the fault of the company, its subsequent acts, short of an express agreement, would seem to be of no effect; for they can work no possible harm to the

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assured, who has already lost his right." *Erwin v. Insurance Co.*, 24 Mo. App. 152. Although this was an *obiter dictum*, there is no ground whatever for doubting the soundness of the principle there stated. Here there was not only no express agreement after the time expired for the making of proof of loss—and for the purpose of this case that time expired when this action was brought without such proofs having been made—but there was nothing beyond an offer to pay less than demanded, which offer was by the plaintiffs refused.

The judgment of the circuit court will be reversed, and the case remanded. All the judges concur.

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37 550 FRANK C. RIDDLE *et al.*, Appellants, v. ANDREW F.
76 318 BROWN *et al.*, Respondents.

St. Louis Court of Appeals, November 12, 1889.

Jurisdiction, Appellate. The city of St. Louis is a municipal subdivision of the state within the meaning of section 12, of article 6, of the constitution, and the supreme court has jurisdiction of an appeal in a case in which that city is a substantial party.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

Transferred to Supreme Court.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding in equity, in the nature of a creditor's bill, against Andrew F. Brown and the city of St. Louis, in which the plaintiffs seek to charge a certain indebtedness of the city to the defendant Brown, alleged to have accrued to Brown under a contract between him and the city for the sprinkling of the

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streets, with the payment of certain judgments which the plaintiffs have recovered against Brown. The city answered by a general denial. The plaintiffs obtained a temporary injunction against the city restraining it from paying over to Brown any money due him under the street-sprinkling contract, in excess of an amount sufficient to satisfy the plaintiffs' judgment and costs. Thereafter there was a final hearing, which resulted in a judgment dismissing the plaintiffs' bill. From this judgment the plaintiffs prosecute the present appeal.

It is apparent from the foregoing statement that the city of St. Louis is a substantial party to the proceeding. Indeed, the only remedy which is sought is against the city, and any process which might issue in the cause, if finally determined in favor of the plaintiffs, would run against the city. The city of St. Louis being a municipal sub-division of the state, within the meaning of section 12, of article 6, of the constitution, and the subsequent constitutional amendment establishing the jurisdiction of this court, and being a substantial party to the cause, this court is without jurisdiction, and the cause must be transferred to the supreme court. It is so ordered. All the judges concur.

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W. W. WULZE, Appellant, v. WM. SCHAEFER, Respondent.

St. Louis Court of Appeals, November 19, 1889.

Consideration, Presumption of. Under Revised Statutes, 1879, section 663, not merely non-negotiable promissory notes, but all promises in writing, for the payment of money or property, whether conditional or absolute, import a consideration.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

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F. & E. L. Gottschalk, for the appellant.

The statutes provide that "All instruments of writing made and signed by any person, or his agent, whereby he shall promise to pay to any other or his order, or unto bearer, any sum of money or property therein mentioned, shall import a consideration, and be due and payable as therein mentioned." R. S. 1879, sec. 663. Similar instruments have been held to come within the statutes, whether they be negotiable or non-negotiable. *County of Montgomery v. Auchley*, 92 Mo. 129; *Spears v. Bond*, 79 Mo. 470; *Skinner v. Skinner*, 77 Mo. 155; *Taylor v. Newman*, 77 Mo. 263.

Campbell & Ryan, for the respondent.

The instrument sued on was not within the meaning of section 663 of the Revised Statutes. That statute was intended to cover promissory notes, giving to non-negotiable notes the same *prima facie* character of value that the law gives negotiable paper.

Biggs, J., delivered the opinion of the court.

This suit is brought on the following written instrument executed by the defendant, to-wit: "If I take possession of saloon, 306 Chestnut street, I will pay W. W. Wulze one hundred dollars on demand. $100.00."

"Nov. 4, 1885. W. Schaefer."

The suit originated before a justice of the peace, where the plaintiff obtained judgment, but, on a trial *de novo* in the circuit court, a final judgment was entered for the defendant, and from this latter judgment the plaintiff has prosecuted this appeal.

On the trial the plaintiff introduced evidence tending to prove that the defendant, in November, 1885, took possession of the saloon mentioned, and had been running it since that time. The only other evidence

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offered was the instrument itself. At the close of the plaintiff's case, the defendant asked an instruction, in the nature of a demurrer to the plaintiff's evidence, which the court gave; thereupon the plaintiff submitted to a non-suit, with leave to move to set it aside. In due time this motion was filed and overruled.

The opinion of the trial court seems to have been, that the instrument in suit was not of that class which by virtue of our statute (R. S. 1879, sec. 663) import a consideration. If the court was right in this, then the judgment must stand, for the reason that the plaintiff introduced no evidence tending to show any consideration for the contract.

We are clearly of the opinion that the writing is not a promissory note, but it does not necessarily follow from this, that the obligation is not within the meaning of the statute. At common law all contracts under seal, and by the law merchant all negotiable instruments, imported a consideration, and in suits to enforce either it was not necessary for the plaintiff to allege and prove a consideration. The defendant's counsel insists that the only effect or change made by the statute (sec. 663) was to extend this rule to non-negotiable notes. The language of the statute will not admit of so narrow a construction. A fair interpretation will include all instruments of writing whereby one person shall promise to pay another money or property, and it makes no difference whether the promise is conditional or unconditional. If the promise is made to depend upon a contingency, then upon the happening of the contingency the promise becomes absolute. The supreme court in the case of *Montgomery County v. Auchley*, 92 Mo. 129, in construing this section of the statute, said: "By force of our statute (R. S., sec. 663), non-negotiable instruments also import a consideration. *Taylor v. Newman*, 77 Mo. 257. This statute also applies to a large class of contracts in writing which do not come

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under the designation of negotiable or non-negotiable notes or bills, and in all cases to which the statute applies it is not necessary to plead the consideration."

The views indicated by us necessarily lead to a reversal of the judgment. With the concurrence of the other judges, the judgment will be reversed, and the cause remanded.

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42	550
37	554
51	675
37	554
63	229
37	554
72	115
37	554
79	138
37	554
101	505

JULIUS D. ABELES, Appellant, v. WESTERN UNION TELEGRAPH COMPANY, Respondent.

St. Louis Court of Appeals, November 19, 1889.

Damages. When a telegraphic message is sent in cipher, and the telegraph company is not apprised of its meaning, only nominal damages can be recovered for mere delay in delivery by the company, not equivalent to non-delivery; and in case of non-delivery, or delay in delivery substantially amounting to non-delivery, the cost of the message with interest constitutes the measure of damages.

Appeal from the St. Louis City Circuit Court.—HON. D. D. FISHER, Judge.

AFFIRMED.

Sale & Sale, for the appellant.

Plaintiff is entitled to substantial damages. *Markel v. Tel. Co.*, 19 Mo. App. 80; *Milliken v. Tel. Co.*, 18 N. E. Rep. 291; *Tel. Co. v. Du Bois*, 21 N. E. Rep. 4. The special damages alleged in the petition are the direct and proximate consequence of defendant's breach of this dual obligation to plaintiff. Cases cited *supra; Wadsworth v. Tel. Co.*, 86 Tenn. 695; *Fraser v. Tel. Co.*,

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4 South. Rep. 831; *Alexander v. Tel. Co.*, 3 Law Rep. Ann. 71; *Tel. Co. v. Longwill*, 21 Pac. Rep. 339. The fact that the dispatch was in cipher will not prevent a recovery of substantial damages. *Wadsworth v. Tel. Co., supra; Daugherty v. Tel. Co.*, 75 Ala. 168; *Tel. Co. v. Way*, 83 Ala. 542; *Tel. Co. v. Reynolds*, 77 Va. 173; *Hart v. Tel. Co.*, 66 Cal. 579; *Tel. Co. v. Hyer Bros.*, 22 Fla. 637.

Cochran, Dickson & Smith, for the respondent.

Nothing beyond nominal damages, or the sum paid for transmission, can be recovered for neglect in delivery of a cipher message, the meaning of which is not communicated to the company. *Candee v. Tel. Co.*, 34 Wis. 471; *W. U. Co. v. Martin*, 9 Bradwell, 587; *Daniel v. W. U. Co.*, 61 Tex. 452; *Behm v. W. U. Co.*, 8 Bissell, 131; *Sanders v. Stuart*, 1 C. P. Div. 326; *Beaupre v. Tel. Co.*, 21 Minn. 155; *Mackey v. Tel. Co.*, 16 Nevada, 222; *Landsberger v. Magnetic Co.*, 32 Barb. 530; *Gildersleeve v. Tel. Co.*, 29 Md. 250; *Belun v. Tel. Co.*, 8 Cent. Law J. 445; *Shields v. Tel. Co.*, 9 West. L. J. 283; *Hadley v. Tel. Co.*, 15 N. E. Rep. 845.

THOMPSON, J., delivered the opinion of the court.

The court sustained a demurrer to the following petition, and the plaintiff has appealed: "Plaintiff states that defendant is a corporation duly organized, and is, and at all times hereinafter mentioned was, engaged in the business of telegraphing for hire, between the city of St. Louis, in the state of Missouri, and the city of San Francisco, in the state of California, and had an office in the city of St. Louis, Missouri; that, on or about May 19, 1888, the plaintiff was a stockholder in the Black Oak Mining and Milling Company, a corporation under the law of Illinois, owning and operating a gold mine in Tuolumne county, California; that the

capital stock of said corporation consisted of three hundred thousand shares of the par value of ten dollars a share.

"And plaintiff states that, being a stockholder in said corporation as aforesaid, he employed one M. Rich, an expert in mines and mining properties, to go to said county of Tuolumne, in California, to examine said mine and report thereon to plaintiff by telegraph; that for the purpose of receiving such message from said M. Rich, the plaintiff adopted as his name the word "Magnate," which word, or name, was duly entered by defendant in its register book at its office in St. Louis, Missouri, as signifying and standing for the name of plaintiff; that said register is kept by defendant for the purpose of identifying its patrons who desire messages sent to them under fictitious names; that afterwards said M. Rich made an examination of said mine, and on May 23, 1888, telegraphed to plaintiff from San Francisco, California, the following message in cipher, to-wit:

'San Francisco, Cal., May 23, 1888.

'*To Magnate, St. Louis, Mo.:*

'Emperor, Empress, Iniquity, Aback, Mutineer, Dish, Chaffing, Magister, Bunnel.

'(Signed.) M. Rich.'

'That said message when translated reads as follows:

'San Francisco, Cal., May 23, 1888.

'*To J. D. Abeles. St. Louis, Mo.:* Mine does not look so well as I expected; mine is being badly managed; I advise you to sell. Black Oak Mine is worth less than fifty thousand dollars.

'(Signed.) M. Rich.'

"That said message was delivered to defendant's agent at San Francisco, who was then and there informed by said Rich that said message was of great importance, and the usual charge of one dollar for transmission and delivery of messages to St. Louis, Missouri, was made,

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and paid by plaintiff to defendant; that in consideration of such payment the defendant undertook to transmit and deliver said message to plaintiff with due and proper care and diligence.

"Plaintiff states that said message was correctly transmitted and received by defendant at its St. Louis office, but that owing to defendant's negligence and carelessness and want of diligence, said message was not delivered to plaintiff until the fourth day of June, 1888.

"Plaintiff states that on May 23, 1888, the day when said telegram should have been delivered, he owned and held nineteen hundred and fifty (1950) shares of said stock in said mining company, worth in the market on said day fifty cents per share; that but for the negligence and carelessness of defendant as aforesaid, he could and would have sold his said stock for the sum of nine hundred and seventy-five ($975) dollars; that thereafter, in consequence of his not hearing from said Rich prior to June 4, 1888, he sold his said stock at and for the best price obtainable, at the times, and for the prices following, to-wit:

"On May 25, 1888, 600 shares at 37½ cts. a share.

"On May 28, 1888, 500 shares at 35 cts. a share.

"On May 28, 1888, 100 shares at 32½ cts. a share.

"On May 28, 1888, 500 shares at 30 cts. a share.

"On June 5, 1888, 250 shares at 28¾ cts. a share; aggregating in amount the sum of six hundred and fifty-four dollars and thirty seven and one-half cents.

"That by reason of the premises the plaintiff has been damaged in the sum of three hundred and twenty dollars and sixty-two and one-half cents, which sum plaintiff heretofore, to-wit, on July 2, 1888, demanded of defendant, but which defendant refused to pay. Wherefore plaintiff asks judgment against defendant for the sum of three hundred and twenty dollars, sixty-two and one-half cents, with interest from July 2, 1888, and for costs of suit."

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The question thus presented for decision is whether where a telegraph message is delivered to the agent of a telegraph company *in cipher*, and the agent is not apprised of the meaning of the words, and is not advised of the damages which will probably ensue to the person to whom the message is directed in the case of a non-delivery or of an unreasonable delay in delivering,—substantial damages can be recovered of the company. The question of the liability of a telegraph company for delay in delivering a cipher dispatch, or for the non-delivery of such a dispatch, has never been before the courts of this state, so far as we know.

We are of the opinion that the measure of damages in such a case is that laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, which is that, where two parties have made a contract which one of them has broken, the damages which the other ought to recover in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract, as the probable result of the breach of it. Where the agent of a telegraph company receives for transmission a dispatch, the meaning of which is unknown, no consequential damages, such as are sought to be recovered in this case, can be fairly regarded as arising naturally, that is, in the usual course of things, from a failure to deliver the message; nor can such damages be supposed to have been in the contemplation of the sender of the message and the agent of the company who received it, at the time when it was received for transmission.

Re-affirming this doctrine and speaking with reference to a case where the dispatch, though not in cipher, was in terms not calculated to advise the company that

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extraordinary care or speed was expected in transmitting the dispatch, it was said by ALLEN, J., in the court of appeals of New York: "Whenever special or extraordinary damages, such as would not naturally nor ordinarily flow from a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purpose for which, it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of the damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract. *Baldwin v. United States Telegraph Co*, 45 N. Y. 744: s. c., 6 Am. Rep. 165, 169.

Applying this rule of damages, we find that several authoritative courts have held that, in the case of an unreasonable delay in delivering a cipher dispatch the terms of which have not been communicated to the telegraph company, the plaintiff can recover at most nominal damages, or, as some hold, the amount received for transmission. *Sanders v. Stuart*, 1 C. P. Div. 326; s. c., 35 L. T. (N. S.) 370; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 425; *Daniel v. Western Union Telegraph Co.*, 61 Tex. 452; s. c., 48 Am. Rep. 305; *Western Union Telegraph Co. v.*

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Martin, 9 Bradw. (Ill.) 587; *Behm v. Western Union Telegraph Co.*, 8 Biss. (U. S.) 131.

We have been cited to three opposing decisions,—*Western Union Telegraph Co. v. Reynolds*, 77 Va. 173; s. c., 46 Am. Rep. 715; *Western Union Telegraph Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844; *Western Union Telegraph Co. v. Hyer*, 22 Fla. 637; s. c., 1 Am. St. Rep. 222. These decisions were all rendered by divided courts. They either ignore, or seek to restrain, the rule of damages laid down in *Hadley v. Baxendale*, 9 Exch. 341, and they do not commend themselves to our approval.

Aside from the reasons which support the rule of damages in *Hadley v. Baxendale*, there is here a question of public policy to which we could not shut our eyes if we were in doubt upon the question. Under any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it or a total failure to deliver it, the door is open to unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They can construct any meaning which they may choose, and, upon the meaning thus constructed they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit.

While telegraph companies are not common carriers, their duties are analogous to those of common carriers; and the well-known rule, in regard to the liability of a common carrier in the case of goods of such a peculiar character, is that extra precautions must be taken in carrying or storing them, and that the carrier is not liable for the failure to take such extra precautions where a knowledge of the nature of the goods was not communicated to him. If the shipper wishes to

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charge the carrier with the peculiar degree or kind of diligence, which the extraordinary nature of the property requires, he is bound, in reason and justice, to apprise the carrier of the nature of the goods. Upon the same principle it has been suggested that it would be a fair conclusion in a case of this kind that in order to charge the telegraph company with any extraordinary damages which might accrue for its failure promptly to transmit a cipher message, the sender ought, in reason and in justice, at least to apprise the carrier of the translation of the message.

In respect of the exact damages to which the plaintiff is entitled on this petition, we incline to think that the proper view is that, where the delay has not been so great as to amount to a substantial failure of the telegraph company to perform the duty which it has undertaken and for which it has been paid, the plaintiff can recover nominal damages only. But where the delay has been so great as to amount substantially to a failure to perform the duty undertaken, we are of opinion that the proper measure of damages in such a case as the one before us is the sum paid for the transmission of the message, with interest. This was the rule of damages laid down by the supreme court of Wisconsin in *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452, where there was a total failure to deliver the message. In the present case, the message was delivered to the defendant's agent at San Francisco, for transmission to the plaintiff at St. Louis. A delay of eleven days supervened in its delivery, which the demurrer admits was owing to the negligence of the defendant. We know judicially that a letter will come from San Francisco to St. Louis in half of the time in the ordinary course of mail. Such a delay should be regarded, as a conclusion of law, as tantamount to a non-delivery; and the measure of damages in such a case should be the amount paid for transmission, with

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interest from the date of demand, or, in case of no demand, from the date of the bringing of this action.

In strictness upon the record the plaintiff is therefore entitled to recover one dollar with interest. But the counsel for both parties have stated at the bar that the record has been brought here in the present shape for the sole purpose of testing the right of the plaintiff to recover substantial damages beyond the cost of transmitting the message. The plaintiff, by his counsel, having thus waived the right to recover nominal damages, or the amount paid for the transmission of the message, and our opinion on the main question being the same as that of the circuit court, the judgment will be affirmed. It is so ordered. All the judges concur.

Ex Parte JOHN J. HALEY.

St. Louis Court of Appeals, November 19, 1889.

1. **Contempt, Proceedings For.** A receiver appointed under the attachment act, who disobeys an order of the court to pay over funds in his hands, is in contempt of the court, and may be imprisoned by the court therefor until he purges himself of the contempt by compliance with the order.
2. ———. In case the attachment suit, in which the receiver was appointed, is, after such appointment, removed by change of venue to another court, such other court has jurisdiction to make and enforce such order.
3. ———. In such a case an attachment for contempt may issue in the first instance, without any preliminary citation to show cause.

Original Proceeding by Habeas Corpus.

PRISONER REMANDED.

M. G. Reynolds and *D. H. Ball*, for the petitioners.

The court, being one of general jurisdiction, has the authority to commit for contempt, and the petitioner

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ought not to be discharged. R. S. 1879, sec. 2648; *Ex parte McKee*, 18 Mo. 599; *Ex parte Goodin*, 67 Mo. 647. The receiver is an officer of the court standing in the shoes of the sheriff in respect of the matter specially entrusted to him by the court, and, by accepting which, he subjected himself to the full and complete jurisdiction of the court to make and enforce, as for contempt, obedience by him to all lawful orders of the court independent of any statute. Beach on Receivers, sec. 291; *Ex parte Crenshaw*, 80 Mo. 447. It is not an imprisonment for debt simply because the order relates to money, which the receiver reports he has as such officer. *Robert v. Stoner*, 18 Mo. 447; *Coughlin v. Ehlert*, 39 Mo. 285; *Ex parte Crenshaw*, 80 Mo. 447.

THOMPSON, J., delivered the opinion of the court.

The questions for decision arise upon a demurrer to the return, from which it appears that the petitioner was duly appointed a receiver to take charge of a growing crop levied upon in an attachment suit; that such proceedings were had in the attachment suit that the attachment was abated; that thereupon, in pursuance of an order of the court, the petitioner filed a report as such receiver showing a balance in his hand as receiver of $400.91; that the court thereupon ordered him to pay this money to the personal representatives of the defendant in the attachment suit, who had died pending the suit, of which order the petitioner had due notice; that the petitioner failed to comply with this order, without showing, or offering to show, any excuse therefor; that thereupon the attorneys of such personal representatives, on the sixth of September, 1889, served upon the petitioner a notice reciting the foregoing facts, and notifying him that they would on that day move for an attachment against him for contempt in declining to obey the order of the court; that thereafter, on the twenty-fourth day of September, Haley having failed to

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appear in pursuance of said notice, the court made an order reciting in detail the previous proceedings in the cause, adjudging him guilty of contempt, directing an attachment to issue against him, and directing his confinement in the county jail, unless he should, on or before the fifteenth of October thereafter, purge himself of the contempt by complying with the order to pay over the money; and commanding the sheriff to keep him in the county jail until he should pay the money into the hands of the sheriff.

The foregoing statement of the facts shows that we must remand the prisoner. By section 2648, Revised Statutes, "it shall be the duty of the court or magistrate forthwith to remand the party, if it shall appear that he is detained in custody, either * * * third, for any contempt, specially and plainly charged in the commitment, by some court, officer or body having authority to commit for a contempt so charged."

That the refusal of a receiver to pay over, in compliance with an order of the court whose officer he is, moneys which he professes to have in his hands as such receiver is a contempt of court, is a proposition which, in our judgment, does not require argument. The power which existed at common law to enforce compliance with such orders, by proceedings as for contempt, was manifestly intended to be reserved to the courts by the following sections of the Revised Statutes: "Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for contempt, for the purpose of enforcing any civil right or remedy." R. S. 1879, sec. 1059.

In commenting on this section, the supreme court, in *Ex parte Crenshaw*, 80 Mo. 450, says: "The effect of this section is to leave the punishment for contempt, in cases other than those embraced in section 1055, as at common law. The power to commit as for contempt any officer, or party, in a proceeding for the purpose of

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enforcing a civil right or remedy, relates only to such conduct as tends to defeat or impair the right or remedy of a party. It must be for a disobedience of some order or process made or issued, in order to preserve such right as the parties, or adverse party, may establish to the property in controversy."

The counsel for petitioner argues that the receiver is not an officer, within the meaning of section 1059, and further argues that the disobedience of the order in the present case was not one tending to impair or defeat the right or remedy of the party complaining because it affects money and not specific property, and because the party complaining has an adequate remedy on the receiver's bond or on the bond of the plaintiff in the attachment. We think that neither of these propositions is tenable. The receiver, in attachment proceedings, is a mere substitute for the sheriff, and as much an officer of the court as the latter, and it is not essential that the disobedience should *defeat* a right or remedy; it is sufficient if it *impair* it in any manner.

Nor do we see any force in the argument that the petitioner was appointed receiver by the Louisiana court of common pleas, and that the present order of commitment is made by the circuit court of Ralls county, to which a change of venue in the attachment suit was taken. The change of venue removed the cause to the circuit court of Ralls county, for all purposes and with all its incidents. No jurisdiction remained in the Louisiana court of common pleas to take any steps in the cause except to effectuate the order changing the venue; and the receiver became thereafter the officer of the circuit court of Ralls county, and subject to its lawful orders. We do not think it necessary to argue the proposition that the order changing the venue did not have the effect of splitting the action into two parts, transferring the attachment suit to Ralls county, and leaving the receivership as a trust to be administered by the Louisiana court of common pleas.

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Nor do we think that the petitioner is entitled to a discharge on the ground that he did not have sufficient notice of the proceedings against him. Regularly, a preliminary rule to show cause why an attachment should not issue is the practice in proceedings of this sort. But such a rule is not necessary to the jurisdiction; an attachment may issue in the first instance. *Ex parte Mason*, 16 Mo. App. 41, 45. It was held in this last case, with the concurrence of all the judges, that every court has authority to compel the personal attendance of its officers, when necessary to the due performance of its functions, or in vindication of its authority. It seems to result from this that, even if the statute has changed the rule at common law so as to require, in case of one not an officer of the court, reasonable notice before attachment for contempt, such change does not affect proceedings against an officer, who, in contemplation of law, is present in court and subject to its orders at any time. There is nothing in the elaborate record of the proceedings, which has been exhibited by the sheriff in his return, which raises the slightest suspicion that the prisoner was deprived of any opportunity of making any defense which he may have had; nor does he state in his petition that he had any defense to make. The case is the naked one of an officer of court refusing to obey its lawful orders while having it in his power to do so. A commitment for this cause, recited in detail in the order of commitment, is a commitment "for a contempt specially and plainly charged," within the meaning of section 2648, Revised Statutes.

The demurrer is according overruled. Judge Rombauer concurs. Judge Biggs, having been of counsel in the attachment suit, takes no part in this decision.

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ANCHOR MILLING COMPANY, Appellant, v. MICHAEL WALSH, Respondent.

St. Louis Court of Appeals, November 19, 1889.

1. **Evidence**: BOOKS OF ACCOUNT. Books of account of a party are not admissible in evidence in his favor, although supported by the suppletory oath of himself, or of the clerk who made the entries.

2. ———: ———. Such books may be used as memoranda to refresh the memory of a witness, but the witness must, after his memory has been thus refreshed, testify from recollection independent of the entries.

3. ———. Where a party produces books or papers in court at the instance of the opposite party, he may put them in evidence, although he would not otherwise have been entitled to do so.

4. **Practice, Trial**: INSTRUCTIONS. Although it is not error to refuse an instruction, stating that a party having the burden of proof must satisfy the jury "by a preponderance of evidence," the unexplained use of this expression in an instruction, which is given, is not ordinarily prejudicial error.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED, (*certified to the supreme court*).

Geo. M. Stewart, for the appellant.

A. R. Taylor and *A. A. Paxson*, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action to recover certain over-payments, alleged to have been made by the plaintiff to the defendant through mistake of the plaintiff and the fraud of the defendant. The answer was a general denial. The parties went to trial before a jury, and the defendant had a verdict and judgment, from which the plaintiff prosecutes this appeal.

I. The first error assigned is the exclusion of the shipping-book of the plaintiff which the plaintiff offered

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in evidence. In order to understand this assignment of error, it should be stated that the evidence was to the effect that the defendant was employed by the plaintiff to do all of the hauling for the plaintiff at stated prices per barrel for flour and per sack for wheat; that the plaintiff had advanced a large sum of money to the defendant to fit him out in the business; that the plaintiff settled with the defendant on each Saturday evening for the week's hauling; that the manner in which the settlements took place was that the defendant would produce to the secretary of the plaintiff certain statements which had been ostensibly furnished to him from the shipping-books of the plaintiff which were kept in a warehouse separate and distinct from the plaintiff's counting-room, which statements purported to show the number of barrels, sacks, etc., which the defendant had hauled during the week. On the basis of these statements, the secretary of the plaintiff would figure up the amount due the defendant for the week's hauling, would deduct therefrom any advances of money which the plaintiff had made to the defendant during the week to enable him to pay ferriage, etc., and also would generally deduct a small sum to be applied in liquidation of the advance which the plaintiff had made to the defendant to fit him out in business, as above stated. The amount of hauling, which these statements represented the defendant as having done from week to week, increased to such an extent as to excite the suspicion of the secretary of the plaintiff; whereupon an investigation was had, and it appeared that the amounts were greatly in excess of the amounts shown by the shipping-books of the plaintiff from which the statements purported to have been taken. This led to an explosion, to a criminal prosecution and to the present action, in which the teams of the defendant were attached by the plaintiff. No question relating to the attachment is before us for examination.

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The theory on which the plaintiff offered in evidence its shipping-books was that the weekly statements on which the defendant was paid were professedly drawn from them, and that they were hence a part of the *res gestæ*. Many cases from other jurisdictions are cited to support the view that these books should have been received in evidence as being books of original entries. We do not see anything in this case to take it out of the rule of evidence which has long been settled in this state, that the account books of a party are not admissible in evidence in his own favor, although supported by the suppletory oath of himself or of the clerk who made the entries in the books. This has been the settled rule in this state since the decision in *Hissrick v. McPherson*, 20 Mo. 310. This will appear from the following cases: *Cozens v. Barrett*, 23 Mo. 544; *Anderson v. Volmer*, 83 Mo. 403, 408; *Daum v. Neumeister*, 2 Mo. App. 597; *Lord v. Siegel*, 5 Mo. App. 582; *Hanson v. Jones*, 20 Mo. App. 595, 601; *Hensgen v. Mullally*, 23 Mo. App. 613; *Weadley v. Toney*, 24 Mo. App. 304; *Nipper v. Jones*, 27 Mo. App. 538. As we understand it, the rule in this state goes no further than this: The party or his witness may refresh his memory from the entries in the book, and then testify as to the fact independently of the entries, if he can do so after his memory has been thus refreshed. *Nipper v. Jones*, *supra*, per PHILIPS, P. J. In *Anderson v. Volmer*, *supra*, it was said by Mr. Commissioner PHILLIPS that "It was wholly incompetent for the plaintiff to testify to facts which he obtained alone from the book." These decisions distinctly show that the rule in this state is that a book of accounts cannot be made original evidence by producing testimony to the effect that it has been correctly kept.

The case of *Shepard v. Bank of Missouri*, 15 Mo. 143, does not seem to go against the rule thus stated at all; for that was the case of a stated account. But if it

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does go against the above rule, it is to be observed that it was decided prior to the case of *Hissrick v. McPherson*, 20 Mo. 310, and is necessarily overruled by the latter decision.

The decision of the question is somewhat embarrassed by the language of Judge WAGNER in *Smith v. Beattie*, 57 Mo. 281, 283: "The defendants proved by their book-keepers and clerks that the books were accurately kept, and they testified to the universal custom in the bank, as to how the entries were made in the regular course of business; that the entries were made and the books written up each day from the checks of the customer or the tickets of the teller, and that the books were then balanced to verify their accuracy. This was almost precisely the testimony that was admitted in the case of *Shepard v. Bank of Missouri*, 15 Mo. 143, and was then regarded as too plainly admissible for argument." But this language was evidently founded on a misapprehension of what was held in *Shepard v. Bank of Missouri*, *supra*, and, besides, it ignored the subsequent decision of the court in *Hissrick v. McPherson*, 20 Mo. 310. Moreover, we do not find that rule as there laid down has ever been approved in any subsequent case, or that the case has ever been subsequently cited. Nevertheless, we should feel bound to follow and apply the doctrine there stated, if it had been necessary for the judgment of the court. But we find that that case is unlike the one now before us in a very important particular. The books of the defendant bank, which were there admitted in evidence for the defendant, had been *produced in court* at the instance of the plaintiff. Now, it is a rule of evidence that where books or papers are produced at the instance of the opposite party, the party producing them may put them in evidence, although he would not otherwise be entitled to do so. 1 Greenl. Ev., sec. 563. The rule and the reason for it are fairly stated by BIGELOW, J., in *Clark v. Fletcher*,

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1 Allen (Mass.) 53, 57. It follows that in *Smith v. Beattie*, *supra*, the books, having been produced on motion of the plaintiff, were competent evidence for the defendant on any theory; and we prefer to restrain that case to the facts which were strictly in judgment, rather than to regard it as overturning a doctrine which has been re-affirmed in this state by repeated decisions.

Nor do we see any ground on which the present case can be taken out of the rule, on the theory that the shipping-books were a part of the *res gestæ*. We see no distinct evidence of the fact that the defendant examined the entries in the books or assented to their correctness. In the case of *Hanson v. Jones*, 20 Mo. App. 596, where we held the books admissible, the parties had accounted together and settled on the basis of an account contained in the plaintiff's books of account, and there was a mistake against the plaintiff which appeared on the face of the account. They were, therefore, regarded by us as admissible, on the footing of being admissions by the defendant against his interest, and as being relevant evidence, in that they showed the manner in which the settlement had been made and the balance struck, and thus showed the existence of the error and how it arose. We conceded that, if these facts had been out of the way, the books would not have been admissible as original evidence to prove the plaintiff's demand against the defendant. If such a state of facts had been disclosed by the evidence in the case now before us—if the evidence had tended to show that the plaintiff and the defendant had accounted together on the basis of the entries in these books, we should say that this case would be governed by that decision. But it simply appears in this case that another employe of the plaintiff named Timmons professedly drew off from these books the statements on which the account of the defendant was settled by the plaintiff's secretary and cashier, every Saturday night, and that the statements

so drawn off were taken from the plaintiff's warehouse, where the shipping-books were kept, to the secretary, sometimes by the defendant, and sometimes by Timmons. There is no evidence that the defendant was in any manner privy to the entries in the shipping-books; that he directed them to be made, was cognizant of the manner in which they had been made, or ever assented to their correctness.

In *Weadley v. Toney*, 24 Mo. App. 304, Judge ELLISON, speaking for himself, took occasion to say that he thought the view of Doctor Greenleaf, which would admit such book entries on the footing of necessity (1 Greenl. Ev., sec. 118) is the correct view. The members of this court are all of the opinion that it is desirable that the rule laid down in the Missouri cases should be reconsidered. We fear that it has produced a failure of justice in this case. We do not see how, under the rule which obtains in this state, a merchant can prove an account consisting of many items, especially after the lapse of much time from the transactions. Only a reckless or dishonest witness would take such an account, and say that, from his memory, refreshed by it, he could testify independently to the correctness of the different entries. But we have no power to reconsider the rule, nor can we deviate from it in deference to the decisions of the courts of other states, however much we may respect them. We are, therefore, unable to say that the court committed error in excluding these books.

II. If the court committed no error in ruling out these books of original entries, for stronger reasons it committed no error in excluding certain statements prepared by the plaintiff's secretary and cashier and its superintendent, and verified by the testimony of the persons who prepared them, which statements had also been made from books of original entry kept by the plaintiff, which books had been verified by the parties

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who made the entries. Of course, transcripts from the books could not possibly be better evidence than the books themselves. This disposes of the second assignment of error.

III. At the request of the defendant, the court gave the following instruction: "The court instructs the jury that, if they believe from the evidence in this case that the plaintiff had in its possession statements showing the amount earned by the defendant each week, and that the plaintiff, by its agents, designedly lost or destroyed such statements, then the jury may take such fact into consideration in arriving at their verdict." The only evidence on which to base this instruction consisted of testimony to the effect that such statements were made out by Timmons, an employe of the plaintiff, and produced either by Timmons or the defendant to the plaintiff's secretary and cashier, as the basis of the weekly settlements which were made with the defendant, as already stated; that those statements were placed on a metallic file and were afterwards strung together by the office boy and placed upon a certain shelf in the plaintiff's office, and that they had disappeared and could not be found, although the most diligent and thorough search had been made for them. Beyond this there was no evidence pointing in the direction that these statements had been designedly lost or destroyed by any agent of the plaintiff acting in its behalf. It is quite plain that the statements were important instruments of evidence on behalf of the plaintiff. This appears from the fact that the plaintiff was obliged to give secondary evidence of their general nature, after laying a foundation therefor by proving their loss. It is also apparent that this action proceeds on the theory that a criminal conspiracy existed between the defendant and Timmons, another employe of the plaintiff, to cheat and defraud the plaintiff. If the jury could be authorized to resort to suspicion or surmise,

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therefore, as to the manner in which these statements came to be lost, such suspicion would rather point toward the defendant and Timmons than toward any agent acting in behalf of the plaintiff. It is very plain to us that there was no basis afforded by the evidence on which this instruction could be thrust into the scale against the plaintiff. That its effect must have been very prejudicial to the plaintiff need hardly be suggested. It necessarily conveyed an intimation to the minds of the jurors that, in the understanding of the court, there was evidence warranting the conclusion, if the jury should see fit to draw it, that the agents of the plaintiff, acting in its behalf, had designedly suppressed evidence in the case. It is, of course, error to give an instruction to the jury upon a hypothesis which has no basis in the evidence; and where the instruction is prejudicial to the unsuccessful party, as in this case, the giving of it must operate to reverse the judgment. *Skyles v. Bollman*, 85 Mo. 35.

IV. Error is assigned upon the giving, at the request of the defendant, of the following instruction: "The court instructs the jury that the law presumes that each of the payments of money testified by Claus [the plaintiff's secretary and cashier] to have been paid to the defendant was money due defendant from the plaintiff, and the burden is on the plaintiff to satisfy the jury, by a *preponderance of evidence*, that such money so paid was not due the defendant." The plaintiff's objection to this instruction is based upon the use of the expression, "by a preponderance of the evidence." It is true that the judge may properly *refuse* an instruction couched in technical terms (2 Thomp. on Trials, sec. 2327, and cases cited). It has been held proper to refuse an instruction containing the expression "preponderance of evidence." *Clark v. Kitchen*, 52 Mo. 316. But in the subsequent case of *Berry v. Wilson*, 64 Mo. 164, our supreme court had occasion to consider

whether the giving of an instruction containing this expression would be ground of reversing a judgment, and the court held that it would not. Cases might, however, arise in which the use of this expression in an instruction would be ground of reversal; and such was the opinion of PHILIPS, P. J., in *Carson v. Porter*, 22 Mo. App. 179, under the peculiar circumstances of that case, though it is not clear that in that case the reversal of the judgment was predicated upon that ground alone. In the later case of *Steinkamper v. McManus*, 26 Mo. App. 51, 56, this court, following *Berry v. Wilson*, *supra*, held that the unexplained use of this expression in an instruction will not warrant a reversal of the judgment, though it is better not to use the expression without explanation. To that view we still adhere. We could not say that the use of the expression in this case was sufficiently prejudicial to work a reversal, especially in view of the fact that the court gave another instruction advising the jury that the burden of proof was on the plaintiff to establish the alleged mistake or fraud to the satisfaction of the jury.

But for the error of giving the instruction pointed out in the third paragraph above, the judgment of the circuit court will be reversed and the cause remanded. Judge ROMBAUER concurs. Judge BIGGS concurs in the result; but, he being of the opinion that this decision is contrary to the decision of the supreme court in *Smith v. Beattie*, 57 Mo. 281, the cause will be certified to the supreme court for final determination.

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T. P. DAVIDSON, Respondent, v. HENRY BOHLMAN, Appellant.

St. Louis Court of Appeals, November 19, 1889.

Physicians' Right to Recover Compensation. **The statutes restricting the right to practice medicine and surgery to registered physicians and surgeons, and requiring the filing of diplomas, apply to one who as a physician gives electric treatments; it is not necessary that one should administer internal remedies in order to practice medicine within the meaning of these statutes.**

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

Stone & Slevin, for the appellant.

The account filed in this case is not sufficient. It is not an itemized account. R. S. 1879, sec. 2852; *Weese v. Brown*, 28 Mo. App. 521; *Hill v. St. Louis, etc., Co.*, 90 Mo. 103. Plaintiff is not entitled to recover for the reason that he was not duly registered as the law required at the time said services were rendered. R. S. 1879, secs. 6302 and 6304; Laws, 1874, p. 111; *Orr v. Meek*, 11 N. E. Rep. 787. A person cannot recover on an implied contract when there is an express contract in force. *Davidson v. Bierman*, 27 Mo. App. 655; *Christy v. Price*, 7 Mo. 433.

H. A. Haeussler and *Walter M. Hezel*, for the respondent.

The statement was sufficient to apprise the defendant of the nature of the suit, and specific enough to be a bar to another action. *Razor v. Railroad*, 73 Mo. 473. There was no express contract in this case, and if

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there was the instruction given worked no harm on defendant. There was no evidence to show that the act of 1874 or 1877 applied to the plaintiff. *State ex rel. v. Francis*, 8 Mo. App. 584.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace to recover upon an account for services for electric treatments for the plaintiff and members of his family. In the view which we take of the law and the evidence it will be necessary to consider but one question. The treatments were rendered in the spring of 1882. The plaintiff did not register as a practicing physician in the city of St. Louis until the following year, when the act of 1883 was about to take effect.

By the act of March 27, 1874, it was provided: "All persons now practicing medicine or surgery in this state, or who shall commence the practice before the first day of September in the year 1874, shall register their names in the office of the county clerk in the county in which they reside, but they shall not be required to file any copies of their diplomas." Laws of 1874, p. 111, sec. 3.

The same statute further provided: "Every person who shall practice, or attempt to practice, medicine or surgery in this state, without first having complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than five hundred dollars; and the fact that any such person has not filed a copy of his or her diploma or registered themselves, as herein required, shall be sufficient defense to any action brought by him (or her) for his or her services rendered or medicine furnished as a physician or surgeon, during the time he or she may have failed to comply with the provisions of this act." *Ib.*, sec. 4.

This was followed by the act of 1877, embraced in the Revised Statutes of 1879, at sections 6301 to 6308.

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This statute renewed the obligation of "every person who shall hereafter engage in the practice of medicine or surgery in this state, other than those who are now authorized to practice by virtue of existing law, to file a copy of his or her diploma in the office of the clerk of the county court of the county in which he or she resides, or desires to practice," etc. Revised Statutes 1879, section 6302. By a subsequent section it is provided: "Any person who shall practice or attempt to practice medicine or surgery in this state, without first having complied with the provisions of this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in the sum of not less than one hundred nor more than five hundred dollars, and shall not be permitted to recover any compensation for services rendered as any such physician or surgeon." *Ib.*, sec. 6304. It is perceived that this statute renewed the obligation to file a copy of diploma with the clerk of the county court, and applied the obligation to those thereafter engaging in practice "other than those who are now authorized to practice by virtue of existing law." This statute was in force at the time of the rendition of the services which are the subject of this suit. At the time of the passage of this statute the plaintiff was not "authorized to practice by virtue of existing law," because the "existing law" was the act of 1874, already quoted, which required him to register his name in the office of the county clerk, which he had not done. He was therefore an unauthorized practitioner, within the meaning of section 6304, was guilty of a misdemeanor for practicing, and was prohibited from recovering compensation for services rendered as a physician or surgeon.

To meet the difficulty which these statutes interpose in the way of a recovery by the plaintiff, his learned counsel suggest that the services here rendered were not necessarily those of a physician or surgeon. States of

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fact might be imagined in which it would become a question for the jury, under proper instructions, to determine whether the person suing for compensation was suing for services rendered in the practice of medicine or surgery, within the meaning of section 6304 of the Revised Statutes of 1879; and in the present case the defendant tendered an instruction submitting the question to the jury, which the court refused. But in the present case the evidence which bears upon the subject has been furnished by the plaintiff himself. There is no discrepancy in any of it, nor are the inferences to be derived from it doubtful or equivocal. In the first place, the bill of items on which he sues describes him as *Dr.* T. P. Davidson. The services are stated in one paragraph to be "electric treatment" and in another paragraph to be "treatment." The plaintiff has called another medical practitioner as a witness to prove the customary value of such services. This physician describes the plaintiff as a "practitioner and electrician" during the ten or eleven years he has known him. The plaintiff himself testifies that he had, at the time of the rendition of the services sued for, practiced medicine in this state for nearly thirty years. He first practiced as an allopathic physician, and afterwards as an electric physician. He had a diploma to practice, which he had received from an electric medical college. This and other evidence furnished by himself is entirely incompatible with the conception, thrown out in argument by his learned counsel, that the services for which he here sues may have been merely services rendered as the keeper of a bathing establishment. It is quite unnecessary, we think, that, in order to practice medicine within the meaning of the statute, the practitioner should give internal remedies. The obvious intention of the statute was to embrace any person who habitually holds himself out as a professor of the art of healing diseases.

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As, upon the plaintiff's own evidence, he was practicing medicine against the prohibition of the statute, it disables him from recovering compensation for his services. The judgment is accordingly reversed; but, as the plaintiff may possibly be entitled to recover the money alleged to have been advanced by him to Dr. Taylor and stated in the last item of the account, the cause will be remanded. All the judges concur.

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THE UNITED STATES OF AMERICA, Respondent, v. WILLIAM HAHN, Administrator of the Estate of HERMAN WIENER, Appellant.

St. Louis Court of Appeals, November 19, 1889.

1. **Administration**: CLAIMS OF THE UNITED STATES. Under the federal statute the United States has the right to priority of payment, over other creditors, out of property of an insolvent estate which is not required for the payment of costs of administration, or of the widow's dower or allowances, and which is not subject to liens.

2. ———. The claims of the United States must, if known to the administrator, be paid out of funds applicable thereto, without any allowance or classification thereof by the probate court, notwithstanding that the statutes of the state contain no provision therefor.

Appeal from the St. Louis City Circuit Court.—HON. D. D. FISHER, Judge.

AFFIRMED.

Bassieur & Schnurmacher, for the appellant.

The United States will respect the state laws governing the administration of the estates of decedents, and

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the claim of the government against such an estate must therefore be presented for classification. *Yonley & Lavender*, 21 Wall. 276. The probate court possesses only statutory powers. Its duty is to classify all demands and then to direct their payment in the order and in the manner pointed out by the statutes concerning administration. *Burckhartt v. Helfrich*, 77 Mo. 376; *Bank v. Suman*, 79 Mo. 527. The priority given to the United States does not extend to property of the insolvent debtor, to which the rights of third persons have attached, before the debt to the government accrued. *Brent v. Bank*, 10 Pet. 596; *Thelusson v. Smith*, 2 Wheat. 396. When the settlement was filed the amount then on hand belonged, under the statute, to creditors whose demands have been established and placed in the fifth class. The suit of the government had not then been determined, and did not constitute a debt.

George D. Reynolds, U. S. District Attorney, for the respondent.

This demand accrued in this case at the time of the breach of the bond (not as appellant's counsel contends, at the time of the rendition of the judgment). Respondent did all the law of this state required it to do, or that it could do thereunder, by exhibiting a copy of this judgment in the probate court (R. S. 1879, sec. 191), and it then became the duty of the probate court to classify it (if there had been any law, which there is not, for its classification) for payment. R. S., sec. 210. And, in the absence of any law for its classification, it was the duty of the probate court to order its payment by the administrator as a preferred claim under the paramount law of the United States (R. S. U. S., sec. 3466), and, in the event of his failure or refusal to do so, he would have become personally liable to respondent, as he had ample funds in his hands, unappropriated and

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bound by no lien, with which to pay it. R. S. U. S., sec. 3467.

ROMBAUER, P. J., delivered the opinion of the court.

In January, 1884, the plaintiff instituted suit against the defendant as administrator of Herman Wiener, on a liability of said Wiener to the United States, and caused him to be served with process on the twenty-second day of said month. Such proceedings were had in prosecuting plaintiff's claim, that thereafter on April 27, 1886, the plaintiff recovered a judgment against defendant, in the circuit court of the United States, for the penal sum of two thousand dollars to be satisfied on the payment of eight hundred and eleven dollars and seventy-one cents and costs. This judgment the plaintiff exhibited in the probate court of the city of St. Louis, and requested the court to make an order upon the defendant as administrator to pay the same, it appearing that there were sufficient funds in the hands of the administrator for that purpose, free from all prior liens. The court refused to make the order, and the plaintiff appealed to the circuit court, where the judgment of the probate court was reversed and that court directed to make the order as prayed for. From this last judgment the defendant appeals to this court.

The Revised Statutes of the United States provide, among other things:

"Section 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied.

"Section 3467. Every executor, administrator or assignee, or other person, who pays any debt, due by

the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

These sweeping provisions have been equitably limited by the judicial construction of the federal courts, so as to deprive them of all hardship. It is now settled by a series of adjudications that the claim of the United States is entitled to no precedence over the widow's dower or allowances (*Postmaster General v. Robbins*, 1 Ware, 165, 167), nor over costs and expenses of administration (*United States v. Hunter*, 5 Mason, 229, 230), nor over liens to which the property has been subjected either by the voluntary action of the debtor or *in invitum*. *Brent v. Bank of Washington*, 10 Pet. 596; *Thelusson v. Smith*, 2 Wheat. 396. It may also be conceded that where the administrator or assignee has paid other claims against the estate, before he has any notice of a claim of the United States, he does not become liable to the latter under the provisions of section 3467. *United States v. Fisher*, 2 Cranch. 358; *United States v. Ricketts*, 2 Cranch, C. C. 553; *United States v. Eggleston*, 4 Sawy. 199.

But the facts of the case at bar do not bring it within any of the exceptions engrafted on the law by judicial construction, either directly or by analogy. Here it distinctly appears that the administrator had notice of the claim as early as January 22, 1884, and that, at the date of his second annual settlement, he had an amount of fourteen hundred and seventy-two dollars and ninety-six cents in his hands available for the payment of debts, which amount for all that the record shows is still so available. Nor does it appear that after payment of all costs and expenses of administration the amount left in his hands is not amply sufficient

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to discharge the claim of the United States, nor that such amount is subject to any lien whatever.

The fact that our laws make no provision for the classification of these demands is wholly immaterial, because the laws of the United States, which are of paramount authority, have made such classification by providing that such debts shall first be satisfied out of the debtor's estate. Allowance and classification by the probate court is not essential to justify the administrator to pay certain preferred claims. It is made his duty by our statute to pay all taxes due the state, or any county, city or town, without any demand therefor being presented to the court for allowance, and to pay them in preference to all claims except funeral expenses and expenses of the last sickness. In the same manner it is made his duty by the statute of the United States to pay debts due to it, of which he has notice, in preference of all claims except those which are entitled to preference under the construction which the law received.

Technically, no order of the probate court was necessary in this instance, and that court might have refused the order on that ground, without committing technical error. But as this appeal is prosecuted for the sole purpose of obtaining the views of a court of final jurisdiction as to the administrator's duties in the premises, we must affirm the judgment, being prohibited by statute from reversing it for error not materially affecting the merits. With the concurrence of all the judges, the judgment of the circuit court is affirmed.

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John N. Straat, Appellant, v. John K. Hayward, Respondent.

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St. Louis Court of Appeals, November 19, 1889.

1. **Practice, Appellate.** Error in rulings of the trial court, which is not prejudicial to the appellant, is no ground for the reversal of the judgment appealed from.

2. ———. An appellant cannot complain that instructions given for the respondent were not warranted by the evidence, when the instructions given at his own request submit to the jury the same issues as those complained of.

3. ———. The refusal of instructions asked by the appellant is not prejudicial error, when the instructions given by the court fairly presented the law of the case to the jury.

4. ———. Error is not assignable of the refusal of an instruction asked by the appellant, if such instruction is contradictory of, and inconsistent with, other instructions given at the request of the appellant, and, moreover, assumes disputed facts.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Affirmed.

John N. Straat, pro se.

The evidence does not warrant the submission of the question of the acceptance of the premises by the appellant as owner. *Prentiss v. Warne*, 10 Mo. 601; *Clemens v. Bloomfield*, 19 Mo. 118; *Kerr v. Clarke*, 19 Mo. 132; *Quinnette v. Carpenter*, 35 Mo. 502; *Gunn v. Sinclair*, 52 Mo. 327; *Livermore v. Eddy's Adm'r*, 33 Mo. 547. And the instruction asked by the appellant that the jury should find for him should therefore have been given.

Jay L. Torrey, for the respondent.

Appellant is estopped to deny that there was evidence tending to show an agreement on his part to

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receive the surrender of the premises and terminate the tenancy, and also tending to show an actual acceptance by him of the surrender. If the trial court at the instance of a party gives an instruction predicated upon the existence of certain evidence, such party cannot be heard in the appellate court to say that no such evidence in fact existed. *Musser v. Adler*, 86 Mo. 445; *Holmes v. Braidwood*, 82 Mo. 610; *Soldanels v. Railroad*, 23 Mo. App. 516.

BIGGS, J., delivered the opinion of the court.

This suit originated in a magistrate's court, where the appellant recovered a judgment; the case was taken to the circuit court, and, on a trial before a jury, the verdict and judgment was for the defendant. The appellant has brought the case to this court by appeal, and asks a reversal of the judgment for two reasons: *First.* Because of the introduction by the respondent of incompetent and irrelevant testimony. *Second.* Because the court committed error, prejudicial to the appellant, in giving the instruction asked by the respondent and refusing instructions asked by the appellant.

The appellant in this action sought to recover of the respondent the rent of a dwelling house, situated in the city of St. Louis, from the twenty-fourth day of June, to the fifteenth day of September, 1886. The respondent had rented the house from the appellant, and had occupied it some time prior to the fifteenth day of June as a tenant from month to month. On the thirtieth day of April, 1886, the respondent wrote to the appellant that he would vacate the house on the first day of June; on the fifth day of May he wrote another letter to the appellant, stating that if the house was not rented he would probably retain it during the month of June, and that he would let the appellant know as soon as he decided what to do; on the nineteenth of May he wrote another letter to the appellant which has been lost, and

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in which the respondent claims he had enclosed a check for the amount of the rent from June first to June fifteenth, and requested the appellant to return the check, if it was not satisfactory that respondent should remain in the house until the fifteenth of June. The appellant admits that he received all of the letters, and did not reply to any of them; but he denied that the last letter contained a request to return the money, if respondent's further stay in the house was not satisfactory to him. On the seventh day of June the respondent again wrote to the appellant asking permission to remain in the house for a few days after the fifteenth of June; to this letter the appellant replied, reminding the respondent that he had failed to give legal notice of his intention to vacate the premises; that he (appellant) had advertised the house for rent, but had failed in securing a tenant; that he had no disposition to hold the respondent to the requirements of the statute provided he could find a tenant to take the house when the respondent got ready to leave. On the twenty-fourth day of June the respondent vacated the premises, and sent to the appellant the key to the house and amount of rent to June 24. The other evidence in the case tended to show the acts and conduct of the appellant in reference to the property after it had been vacated by the respondent, and the length of time the house remained vacant; but the view we have taken of the instructions dispenses with the examination of this evidence by us.

I. The first error assigned by the appellant concerns the letters from respondent to him, which were read in evidence by the respondent. It is sufficient to say that the letters were only admitted on the question of notice of an intention to vacate the premises, and to prove a new contract of renting between the parties. The court instructed the jury that there was no evidence of a legal notice to vacate the property, or of the making of a new contract; therefore the appellant could not

have been prejudiced by the admission of the letters in evidence.

II. The appellant complains of the action of the court in giving the following instructions for the respondent:

"The court instructs the jury that, if they find from the evidence, that on or about June 24, 1886, defendant abandoned the house in question, and that the plaintiff thereupon took possession thereof, with the purpose and intent of holding, and, in fact, did thereafter hold, and ever since has held, possession of said house for his own account, use and benefit, or that of some tenant other than defendant, and to the exclusion and prohibition of defendant from any right, use or benefit of or in said house, then from such taking and holding on the part of plaintiff, his assent to such abandonment of any claim against defendant will be presumed, and these acts of defendant and of plaintiff constitute a cancellation of the contract between them, and plaintiff cannot recover and your verdict will be for defendant."

"The court instructs the jury that, if they find from the evidence that, on or about June 24, 1886, defendant abandoned possession of the house in question, and that plaintiff consented to such abandonment at the time or afterwards, and within a reasonable time took possession of the house for his own account as owner, then plaintiff cannot recover, and you will find a verdict in favor of defendant."

The court also gave the following instructions on appellant's motion:

"The court instructs the jury that the evidence in this case fails to show that defendant served such a written notice on plaintiff, as is required by law to terminate the tenancy under which defendant held the premises in question, and plaintiff is entitled to recover the rent sued for, unless the jury find from the evidence that plaintiff

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agreed with defendant to receive back from him the possession of said premises, and release him from payment of rent therefor from June 24, 1886, and that plaintiff did so receive back the possession of said premises, and release defendant from the payment of rent after June 24, 1886, or that after defendant sent the key to said premises to plaintiff on or about June 24, 1886, accompanied with a check for the balance of rent then due, plaintiff accepted said check and received said key, and took possession of said premises with the intention and purpose of releasing defendant from further liability on account of said rent. But the jury are further instructed that the receipt of the key and entering the house in question by the plaintiff for the purpose of keeping it in repair, and renting it to another tenant and advertising it for rent, do not of themselves show that plaintiff intended thereby to take possession of said premises for his own account and release the defendant from further liability for rent."

"The jury are instructed that if they find from the evidence that defendant left plaintiff's premises on June 24, 1886, and sent the key by mail or message to plaintiff, the receipt of such key in such a way is not a release of the tenant from his liability, if he abandoned the premises without giving a month's notice in writing of his intention to quit."

"The court instructs the jury that mere resumption of possession of premises by an owner, after a tenant has quit, is not of itself enough to defeat the owner's right to recover rent for which the outgoing tenant would be liable; but to make such taking of possession a defense to the owner's claim for rent from the time it occurs, the jury must believe and find from the evidence that the owner took possession for his own account as owner, and not merely to preserve or protect the premises while vacant."

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"The jury are instructed that, if they find from the evidence that defendant paid plaintiff thirty dollars on May 19, 1886, and eighteen dollars on June 24, 1886, that the receipt of that money does not of itself make a contract for the termination of tenancy on June 24, 1886, and does not waive the landlord's right to a month's notice of defendant's intention to quit."

"The court declares the law to be that a tenant from month to month cannot terminate his tenancy without giving his landlord a month's notice in writing of his intention to quit, unless the landlord assent to such termination by resuming possession as landlord. A tenant's notice of intention to quit is not available to him as a notice, unless acted upon by the tenant at the time named in the notice."

These instructions presented to the jury for determination the question, whether the appellant took possession of the house on his own account, or with the intention of releasing the defendant from all obligation to pay rent thereafter. The appellant now contends that there was no evidence authorizing the court to submit this view of the case to the jury, and that by so doing the court committed error which was prejudicial to his case. It must be conceded that the appellant, by his own instructions, assumed that there was some evidence tending to prove that he took possession of the house on his own account, and with the intention of releasing the respondent from the payment of further rent. If, as a matter of fact, the court committed the error now urged by the appellant, it may very well be said, that the appellant invited it, and, having adopted the same theory of the evidence himself, he is now estopped from urging, in this court, any such alleged error. *Holmes v. Braidwood*, 82 Mo. 610; *McGonigle v. Daugherty*, 71 Mo. 259; *Crutchfield v. Railroad*, 64 Mo. 255; *Davis v. Brown*, 67 Mo. 313. Error committed by a trial court, which will authorize a reversal, must have been prejudicial to the party complaining. If the court had refused

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the instructions asked by the respondent, how would that have increased the appellant's chances of recovery? This would have left his own instructions for the consideration of the jury, and as the same question of fact was submitted to the jury by these instructions, how can it be said that the result would have been different?

The appellant's eighth instruction, which the court refused, is as follows:

"The jury are instructed to find for the plaintiff for rent at the rate of sixty dollars per month from June 24, 1886, to September 15, 1886, with six per cent. interest from November 12, 1886, to this date."

This instruction assumed that the appellant's evidence established every fact necessary for a recovery, and that the jury was compelled to give it full faith and credit, and render judgment for the full amount claimed. The instruction is also contradictory of, and inconsistent with, the other instructions asked by the appellant and given by the court. We think the instruction was properly refused.

The appellant's other instructions which were refused by the court we will dispose of with the observation, that the instructions given presented the law of the case to the jury in a very fair way, and the appellant could not possibly have been prejudiced by the refusal of the court to give the other instructions.

Finding no error in the record, the judgment of the circuit court will be affirmed. All the judges concur.

ROMBAUER, P. J., delivered the opinion of the court on motion for rehearing.

Plaintiff moves for a rehearing, claiming that the court overlooked in its opinion his main point, namely, "that the court below erred in not setting aside the verdict of the jury and the judgment entered thereunder which were against the law and against the evidence."

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In deciding that the court did not err in giving the defendant's instructions, we necessarily decided that there was substantial evidence to support them. We further decided that the plaintiff's instructions assume that there was such evidence. Hence, if the mover means that we have not passed on the question whether there was any evidence to support a verdict for the defendant, he is mistaken. If, on the other hand, he means that the weight of evidence is with him, and the trial court erred in not setting aside the verdict as being against the weight of the evidence, he presents a question which is not for our consideration. All the judges concurring, the motion will be overruled.

AUGUSTUS PULLIS *et al.*, Appellants, v. HUGH L. FOX, Garnishee of STEPHENSON WOODS, *et al.*, Respondents.

St. Louis Court of Appeals, November 19, 1889.

Garnishment. A debt due to a partnership cannot he reached by garnishment on a writ of execution against one of its members.

Appeal from the St. Louis City Circuit Court.—HON. D. D. FISHER, Judge.

AFFIRMED.

Henry Boemler, for the appellant.

Where the garnishee claims that the moneys of the judgment debtor, which he admits are in his hands, are affected by a trust, the *onus* is on him to show the trust. *Frank v. Frank*, 6 Mo. App. 588. It would be necessary for the defendant to show that the partnership (if any) extended to this contract for which the money is due. *Webb v. Liggett*, 6 Mo. App. 345.

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M. F. Taylor and *R. L. McLaran*, for the respondent.

If the debtor could not alone sue the garnishee on the debt, then the garnishee cannot be held liable for a debt due from him to the debtor and another. *Kingsley v. Clay Co.*, 14 Mo. 465; *Firebaugh v. Stone*, 36 Mo. 111; *McDermott v. Donnegan*, 44 Mo. 85; *Sheedy v. Bank*, 62 Mo. 17; *Ellison v. Tuttle*, 26 Tex. 283; Drake on Attach. [6 Ed.] sec. 672. One partner's interest in partnership property is not subject to garnishment on execution. *Bertwhistle v. Woodward*, 17 Mo. App. 277; *Fenton v. Block*, 10 Mo. App. 536; *Church v. Knox*, 2 Conn. 514; 1 Chitty's Plead. 8–11.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiffs recovered judgment against Stephenson Woods and John W. Barns, and, upon an execution issued thereon, caused Hugh L. Fox to be summoned as garnishee of said Woods and Barns. At the return of the garnishment, the plaintiff filed interrogatories asking the garnishee to disclose any indebtedness on his part to Barns, one of the defendants. The garnishee answered, stating that he owed J. W. Barns nothing, but that he did owe to the firm of J. W. Barns & Co. $1650.50. The plaintiffs denied that the garnishee owed this money to the firm of J. W. Barns & Co., and asserted that the debt was due to J. W. Barns individually. The garnishee took issue by reply.

Upon the hearing the plaintiffs called the garnishee as a witness, who stated that he made an oral contract with J. W. Barns & Co., a firm composed of J. W. Barns, the defendant, his son, and two other persons, to superintend the erection of a building, and that the $1650.50, above mentioned, was the balance due by him on that contract. That he made payments by checks to

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J. W. Barns & Co., and all receipts given to him were given in that firm name. Upon this, which was in substance all the evidence adduced, the court rendered judgment in favor of the garnishee.

It was decided in *Sheedy v. Second National Bank, Garnishee*, 62 Mo. 17, 22, that an indebtedness due to a firm cannot be seized on process against an individual member of the firm, and consequently one cannot be held as garnishee, upon process against an individual member, by reason of his indebtedness to the firm. Such has ever since been the law of this state. The issue in these cases is formed by the denial and reply. When the plaintiffs asserted in their denial that the indebtedness was one due to J. W. Barns individually, it became incumbent upon them to prove that fact. Having failed to do so, they cannot recover against the garnishee.

The plaintiffs assert the law to be, that where the garnishee claim that the moneys of the judgment debtor, which he *admits* are in his hands, are affected by a trust, the *onus* is on him to show the trust, and cite in support *Frank v. Frank*, 6 Mo. App. 588. That rule has no application, where the garnishee, as in the case at bar, *denies* any indebtedness to the defendant in the execution, although he admits a joint claim of the defendant and others against him. In such case the garnishee's answer is evidence in his favor until disproved.

The garnishee claims an allowance for expenses incurred in this court, but submits no evidence in support of the claim. In conformity with our former practice in similar cases, he will be allowed twenty-five dollars for his expenses in this court.

With the concurrence of all the judges, it is ordered that the judgment of the trial court be affirmed, and judgment be entered in this court in favor of the garnishee for twenty-five dollars.

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E. C. SANDERSON, Appellant, v. ELIZABETH FLEMING *et al.*, Respondents.

St. Louis Court of Appeals, November 19, 1889.

1. **Mechanics' Lien : ENFORCEMENT OF.** In an action, under article 4, chapter 44, Revised Statutes, 1879, for the enforcement of a mechanics' lien before a justice of the peace, the filing of a statement of the plaintiff's cause of action is essential to the jurisdiction of the justice, and the record must affirmatively show the filing thereof.

2. ———. The lien papers must show that the indebtedness accrued within the time prescribed by the statute for the filing of the lien.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

D. T. Jewett, for the appellant.

The two papers, certified copies of which were filed with the justice, before suit brought, to-wit, the lien and the notice when and where suit would be brought, were ample and complete to make a "cause of action," to give the justice jurisdiction, as required by the statute of 1879, section 2874. *Ewing v. Donnelly*, 20 Mo. App. 6.

BIGGS, J., delivered the opinion of the court.

At the close of the plaintiff's evidence, the court instructed that the plaintiff could not recover. When this instruction was given, the plaintiff submitted to a non-suit, with leave to file a motion to set it aside; this motion was filed, and was by the court overruled, and the plaintiff tendered his bill of exceptions and asked for an appeal to this court.

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This action originated before a justice of the peace, and is a proceeding, under article 4, chapter 44, Revised Statutes, 1879, to enforce a mechanics' lien. The justice sustained the lien and the defendants appealed.

The circuit court, as we gather it from the record, was of the opinion that the papers filed before the justice, and which the plaintiff claimed constituted his statement, failed to state a cause of action. The transcript of the justice shows that a statement of the plaintiff's cause of action was filed, but no such document appears among the papers transmitted by the justice, unless the certified copy of the mechanics' lien, and a copy of the notice of suit, both of which appear in the record, can be treated as a statement of plaintiff's cause of action. The plaintiff insists that this should be done, and that these documents contain a statement of all facts necessary for securing a lien on the property of the defendants. This view presents some very serious objections. Section 2874, Revised Statutes, 1879, provides that before the justice can issue any process in a proceeding to enforce a mechanic's lien, the plaintiff must file with the justice a statement of the facts constituting his cause of action; in other words, the jurisdiction of the magistrate depends upon the previous filing of the statement. It is well settled, and must be conceded, that the jurisdiction of inferior courts must affirmatively appear upon the face of their proceedings, and that no presumption will be indulged in support of such jurisdiction. In the case at bar there is no evidence in the record that the copy of the mechanic's lien, and the copy of the notice of this suit, were filed with the justice before the process was issued. It does not appear when these papers were filed, or that they were at any time actually filed as papers in the cause. They are not marked as filed by the magistrate. It is true that the officer attached them to his transcript, and sent them to the appellate court as papers in the case,

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but for aught that appears in the record, these documents may have been used merely as evidence to establish plaintiff's cause of action. But aside from this objection, we are clearly of opinion that the copy of the mechanic's lien and the notice of suit, relied on and read in evidence by the plaintiff, do not state sufficient facts to entitle plaintiff to a judgment; and if these documents could be treated as plaintiff's statement, yet the opinion of the trial court was right and its judgment must be affirmed. If these papers are to be taken as and for the plaintiff's statement, they are defective as such, in failing to state when the indebtedness accrued, or that plaintiff's lien was filed within six months after the work was done, and materials furnished. The general rule is that a petition to enforce a mechanic's lien should state all facts necessary to entitle the plaintiff to a lien, in order that the court may see and pronounce the judgment of the law, and for the further reason that all such facts are *issuable*, and must be averred and proved. *Helzwell v. Langford*, 33 Mo. 396; *Bradish v. James*, 83 Mo. 313. In the lien paper filed, there was nothing to show at what exact date the work and materials were done and furnished, unless we assume that the work was done at the date at the head of the account (Sept. 22, 1888). The presumption is that the date at the head of the account refers to the day when the account was rendered, and not to the day, when the work was done or materials furnished. In this respect this case is very similar in its facts to that of *Hayden v. Wulfing*, 19 Mo. App. 353, except that, in the case cited, the account was aided by the averment, in other parts of the lien papers, that the indebtedness accrued within the time prescribed by the statute for filing the lien. The court held that, but for this averment, the mechanic's lien would have been void. The court in passing on the question said: "In view of the foregoing we have come to the conclusion, that the

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account required by the statute is not necessarily invalidated as a lien, because it fails to give the dates when the work was done, *provided* it appears, from it or other parts of the lien papers filed, that it was completed, and the indebtedness accrued within the period, required by the statute, to entitle the contractor or sub-contractor to a lien."

The papers in the present case contain no averment, either directly or inferentially, that the work was done, or the materials furnished within six months prior to the filing of lien papers. Therefore, any view of the case must inevitably lead to an affirmance of the judgment. With the concurrence of the other judges, the judgment will be affirmed.

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A. K. FLORIDA, Respondent, v. PULLMAN PALACE CAR COMPANY, Appellant.

St. Louis Court of Appeals, November 19, 1889.

Contributory Negligence. Contributory negligence is an affirmative defense, and a plaintiff cannot be debarred from recovery on that ground, unless the evidence adduced by him raises an unavoidable inference of negligence on his part.

Appeal from the St. Louis City Circuit Court.—HON. D. D. FISHER, Judge.

AFFIRMED.

Cochran, Dickson & Smith, for the appellant.

The court should have declared, as a matter of law, that the plaintiff had been guilty of contributory negligence, and was not entitled to recover. *Root v. Car Co.*,

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28 Mo. App. 199; *Wilson v. Railroad*, 32 Mo. App. 682; *Hills v. Railroad*, 31 A. & E. R. R. Cas. 108; *Dargan v. Car Co.*, 26 A. & E. R. R. Cas. 149; *Welch v. Car Co.*, 16 Abb. Pr. (N. S.) 352; *Blum v. Car Co.*, 3 Cent. L. J. 591; *Whitney v. Car Co.*, 1 R. R. & Corp. L. J. 129.

Christian & Wind, for the respondent.

The only question raised by the appellant is that the placing of the clothing on the upper berth was contributory negligence, and that it matters not what may have been the negligence of appellant, no recovery can be had; such is not the law. *Scaling v. Car Co.*, 24 Mo. App. 29; *Bevis v. Railroad*, 26 Mo. App. 19

ROMBAUER, P. J., delivered the opinion of the court.

This is an action for damages caused to plaintiff by defendant's negligence while a passenger in defendant's sleeping car. The suit was instituted before a justice, and, upon a trial anew in the circuit court, the plaintiff recovered judgment for eighty-two dollars and fifteen cents, being the aggregate value of the property hereinafter specified. The only error assigned, and argued by the defendant on this appeal, is that the court should have declared as a matter of law that the plaintiff had been guilty of contributory negligence, and was not entitled to recover.

The plaintiff's evidence tended to show the following facts: He purchased a ticket entitling him to the use of one lower berth in defendant's sleeping car from St. Louis to Moberly, Missouri. Before retiring for the night he placed his coat and trousers, in the pockets of which were a set of false teeth, a pair of gloves, a pocket knife, an abstract of title and seventeen dollars in money in the vacant upper berth immediately over that occupied by himself, the use of which upper berth

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he had not purchased or secured. When the plaintiff awoke at Moberly, he found that his coat and trousers, with all the articles they contained, were stolen while he was asleep. The plaintiff also gave evidence tending to show that he traveled in defendant's cars between St. Louis and Moberly as often as once a week; that he was always in the habit of placing his clothing, upon undressing, in the berth above the one he occupied himself, provided such berth was vacant. There was no evidence in the case that the defendant's servants had express notice of the fact that the plaintiff made such disposition of his wearing apparel on the present occasion, nor was there any evidence that the place where he thus placed his clothing was an unsafe place, nor that the company had provided a safer place as a receptacle for the passenger's clothing.

These being all the material facts of the case, bearing upon the only question presented for our decision, we must conclude that the court committed no error in refusing to declare as a matter of law that the plaintiff could not recover. Contributory negligence in this state is an affirmative defense, and before the plaintiff can be debarred of his recovery on that ground the testimony adduced by him must be such that the facts raise an unavoidable inference of negligence on his part. In all other cases the question is one for the determination of the jury. *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29, 35.

In the very nature of things, a passenger cannot guard his wearing apparel and baggage while he is asleep. What was said about a mixed custody of the passenger and the company in *Root v. Sleeping Car Co.*, 28 Mo. App. 209, must be confined to the passenger while awake, otherwise the term sleeping car would be a misnomer, and the very fact that the passenger fell asleep would constitute an act of contributory negligence. In the absence of all evidence that the place

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selected in this instance was an unusual or dangerous place for a deposit of the passenger's wearing apparel or that the passenger knew, or had reason to know, that it could not, or would not, be as effectually guarded there, as in any other place where he might have deposited it, there was no warrant whatever for withdrawing the plaintiff's case from the consideration of the court, sitting as a jury, on the ground of his contributory negligence.

All the judges concurring, the judgment is affirmed. So ordered.

JOSEPH WEBER, Respondent, v. THOMAS JOHNSON, Appellant.

St. Louis Court of Appeals, November 21, 1889.

1. **Charter Provision, Construction of.** The provision of the charter of the city of St. Louis, providing that no bill should contain more than one subject, is intended to prohibit a practice of joining in the same bill incongruous subjects having no relation or connection with each other, and does not invalidate an ordinance which provides both for the grading and the paving of an alley.

2. ———. Nothing in said charter requires the municipal assembly of said city to fix the elevation of an alley before ordering its improvement.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

M. McKeag, for the appellant.

Ordinance number 14,584, under which these tax bills were issued, contains more than one subject, to-wit, the directing and authorizing the board of public

improvements to grade and pave the alley. The establishing and fixing the grades of alleys, etc., is a legislative power, vested in the municipal assembly, under subdivision second of section 26, article 3, and sections 1 and 15 of article 6 of the scheme and charter, and no such power is given to either the board of public improvements or the street commissioner, by the city charter. This legislative power cannot be delegated. Nor could the municipal assembly lawfully order the improvement of paving in said alley until the grade had been established, the most essential part of the improvement to the property-holders who pay for the improvement. *Ruggles v. Collier*, 43 Mo. 353-66; *Thompson v. Boonville*, 61 Mo. 282; *Galbreath v. Newton*, 30 Mo. App. 380.

Lubke & Muench, for the respondent.

The first objection taken by appellant must be ruled against him under the decision of the supreme court in *Bergman v. Railroad*, 88 Mo. 679. The authorities cited by appellant as supporting his second contention are none of them in point. The contention is that, without the level of the alley is first fixed by ordinance, it cannot be graded or paved at the expense of the adjoining property. The sections of article 6 of the city charter cited by appellant do not sustain him.

Biggs, J., delivered the opinion of the court.

The facts in this case, briefly stated, are as follows: The city of St. Louis by ordinance number 14,584, approved July 9, 1888, authorized the improvement of an alley in city block number 1893. The ordinance was designated as "an ordinance to *grade* and *pave* the alley in city block number 1893," and, as passed, reads as follows: Section 1: "The board of public improvement is hereby authorized and directed to cause the alley in city block numbered 1893, from Montgomery

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street northwardly as far as open, and between Bacon street and Grand avenue, to be *graded* and *paved*." Section 2: "The grading shall be done in accordance with the directions of the street commissioner."

The contract for the improvement directed by this ordinance was awarded to the plaintiff; the work was performed according to the contract, and two special tax bills against the lots of the defendant, situated in this block, were issued to the plaintiff by the city, for the cost of a portion of the work done. The defendant refused to pay, and this suit was brought to enforce the collection of the tax bills. There was a judgment for the plaintiff in the circuit court, from which the defendant has appealed.

The defendant's counsel insists that this judgment cannot be sustained for two reasons: *First*. Because more than one *subject* is expressed in the title and body of the ordinance, contrary to the express inhibition of the charter. *Second*. Before the city could lawfully order the improvement of the alley, the charter required the assembly to fix the elevation of the alley, which in this case was not done, and that this legislative power could not be delegated by the assembly to the street commissioner. These two questions are properly presented by the record for review, and arise out of the admission of evidence and the instructions given and refused.

The defendant's first objection is predicated on section 13, article 3, of the city charter. This section relates to the passage of ordinances by the assembly, and reads as follows: "No bill * * * shall contain more than *one subject*, which shall be clearly expressed in its title." This section of the charter has been the subject of judicial construction by the supreme court in the case of *Bergman v. Railroad*, 88 Mo. 678. The reasoning of the court, in that case, disposes of the defendant's objection adversely to him. The court in discussing the question said: "A similar inhibition is contained in the constitutions of 1865 and 1875,

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and this court has been repeatedly called upon to construe it with reference to the validity of the acts of the legislature, and it has uniformly been held that an act containing a section, relating to matters germane to the general subject expressed in the title, is not obnoxious to such constitutional inhibition, the object of the inhibition being to prevent the practice of joining in the same bill incongruous subjects having no *relation* or *connection* with each other, and foreign to the subject embraced in the title; and that a liberal construction should be placed on the constitutional provision, rather than embarrass legislation by a construction, whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted." The ordinance in question provided for the grading and paving of the same alley. The two subjects embraced in the ordinance are certainly not incongruous, as that term is used by the supreme court; but, on the contrary, the relation or connection between the two subjects is so direct that it might very well be said that, taken together, they form but *one* subject.

To sustain the second proposition, the defendant relies on section one (1) and fifteen (15) of article six (6) of the charter. The first section provides that: "The assembly shall, by ordinance, establish a general plan for the *location* and *graduation* of the streets," etc. This section is silent on the subject of alleys. The other section referred to provides: "That no improvement or repairs shall be ordered upon any future street, alley or highway, which shall not have been *opened*, *dedicated* or *established* according to the provisions of this charter." If the ordinance in question had reference to the improvement of a street, and the elevation of the street had not been previously fixed, and the power to fix it had been delegated by the assembly to the street commissioner, then the ordinance would have been invalid under the authority of the case of *Thompson v. City of Boonville*, 61 Mo. 282. But no such case

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is presented by this record; section one does not make it the duty of the assembly to fix the elevation of alleys.

We do not think that section fifteen has any reference to the *elevation* of alleys. This section makes it unlawful for the assembly to improve any street or alley at the expense of the abutting owners, before such street or alley has been "opened, dedicated or established." The opening or establishing of a street does not necessarily require the determination of its elevation or grade. As we have shown, the charter required the municipal assembly to fix by ordinance the graduation of all streets. This was done with reference to the streets surrounding this alley prior to the passage of the ordinance in controversy. After the grade of the streets had been fixed, the elevation of the alley, necessarily, had to be determined and governed by the grade of the surrounding streets; this involved no discretion or judgment, but merely required the skill of an engineer. This duty, we think, was imposed on the street commissioner by section thirty-five (35), article four (4), of the charter, which makes it the duty of this officer to superintend the construction or reconstruction of all streets and alleys.

Finding no error in the record, the judgment will be affirmed. All the judges concur.

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JOHN F. BARR, Respondent, v. HENRY BLOMBERG, Appellant.

Kansas City Court of Appeals, December 2, 1889.

1. **Justices' Courts:** CHANGE OF VENUE: TRANSCRIPT: DOCKET. On change of venue in a justice's court it should appear by the transcript of the justice before whom the cause originated, if not also in the docket of the justice to whom the case is sent, that there was a change of venue, and the original papers should be sent with the transcript.

2. —— : ORIGINAL ACCOUNT : DISMISSAL. Where on appeal to the circuit court from the judgment of Justice L. the account sued on does not appear among the papers, it is error to permit the filing of an account shown to have been filed before Justice B. when there is nothing in the record showing any connection between Justice B. and Justice L., and defendant's motion to dismiss should have been sustained.

Appeal from the Mercer Circuit Court.—HON. GEO. T. WHITE, Special Judge.

REVERSED AND REMANDED, (*with directions to dismiss*).

W. S. Pope and *T. B. Robinson*, for the appellant.

No account or statement of cause of action was filed with the justice who tried the case, and, as far as the record discloses, it was an original suit before him. R. S., sec. 2851. Revised Statutes, section 2852, provide for a dismissal of the suit if no statement be filed before the justice. *Peddicord v. Railroad*, 85 Mo. 162. After an appeal from a justice and the transcript is filed no amendment can be made. *Horton v. Railroad*, 21 Mo. App. 148; *Norton v. Porter*, 63 Mo. 345.

James E. Hazel and *E. C. Swallow*, for the respondent.

(1) Although there may have been error before the justice in reference to the change of venue, manner of trial, rendition of verdict and judgment, yet upon an appeal to the circuit court it becomes possessed of the cause, and a trial *de novo* ensues, without regard to such errors. Revised Statutes, 1879, section 3052; *Rohrbough, Moore & Co. v. Reed Bros.*, 57 Mo. 292. Jurisdictional defects may be cured by amendment in the circuit court. *Vaughan v. Railroad*, 17 Mo. App. 4. (2) In furtherance of justice our courts have held, time and again, that the name of a party could be changed, and that new parties could be brought in. *Hause v. Duncan*,

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50 Mo. 453; *Beatty & Weakley v. Hill*, 60 Mo. 72. That you could amend from a stated to an open account. *Newburger v. Friede*, 23 Mo. App. 631; *Hanson v. Jones*, 20 Mo. App. 595; *Cullom v. Cundiff*, 20 Mo. 522; *Hanson v. Jones*, 20 Mo. App. 595; *Eubank v. Pope, Lockwood & Co.*, 27 Mo. App. 463; *Allen v. McMonagle*, 77 Mo. 478. (3) On a trial of the merits in the circuit court, the defendant admitted that plaintiff performed labor for him, and the evidence discloses that the only question was the value of such labor per day. Therefore it seems to us that the appellate court must find from the record that none of the errors complained of influenced the result in favor of the plaintiff, and hence the judgment should be affirmed. *Newburger v. Friede*, 23 Mo. App. 631; *Hanson v. Jones*, 20 Mo. App. 595. (4) The case of *Peddicord v. The Missouri Railway Company*, in 85 Mo., does not decide the questions raised by the record.

Ellison, J.—This case involving so trifling an amount has found its way to this court on defendant's appeal. The first record entry of it is this:

"Transcript of W. M. Lawson, docket.

"Change of venue from W. Z. Burton, J. P., in a case wherein John F. Barr, plaintiff, *v.* Henry Blomberg, defendant.

"Plaintiff filed October 10, A. D. 1887, account against the defendant for one and one-half days' labor rendered threshing wheat, and orders a summons to issue, which is done and delivered to the constable and made returnable on the twenty-first day of October, A. D. 1889.

"W. M. Lawson, J. P."

There was a verdict in justice's court for plaintiff, and the defendant appealed to the circuit court where plaintiff again obtained judgment.

The account stated to have been filed was not among the papers, but the court permitted to be filed, as the

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account in suit, an account appearing to have been filed before W. Z. Burton, J. P., September 20, 1887. It was upon an amendment of this that the case was tried. There is nothing in the record showing any connection between Burton, J. P., and the justice who tried the cause.

The only place that Burton appears is at the heading of Justice Lawson's docket merely reciting "Change of venue from W. Z. Burton, J. P." There is no statement of the change of venue in the transcript, nor is there any transcript whatever from Burton. If the cause was before Lawson on change of venue, when a question like the one before us is raised, it should appear by the transcript of the justice before whom the cause originated, if not also in the docket of the justice to whom the case is sent, that there was a change of venue. And the original papers should be sent with a transcript of the proceedings to the justice before whom the case has been sent. R. S. 1879, secs. 2592, 2593. If we should concede that the requirement of this statute was waived by the voluntary appearance of the parties, we would then be compelled to look upon the action as though it originated before Lawson, for there is nothing in the record to show us to the contrary. If it originated before Lawson there was no account filed with him as is required by sections 2851, 2852, and therefore nothing to amend, and under authority of *Peddicord v. Railroad*, 85 Mo. 160, defendant's motion to dismiss should have been sustained. The account which the circuit court permitted Burton to supply seems, on its face, not to have been the same upon which Lawson tried the case, for while Lawson's docket states an account was filed October 10, the account received from Burton was endorsed by him as filed September 20.

The judgment is reversed, and the cause is remanded with directions that the circuit court dismiss the same. All concur.

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ALEXANDER AND RENSHAW, Respondents, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 2, 1889.

Practice, Trial: DEMURRER TO EVIDENCE. Where a fire started inside defendant's right of way and burned along its fence into and destroyed plaintiff's pasture, and there is no evidence showing how the fire originated, or that any engine or train of the defendant had passed on the day of the fire, there is such lack of evidence as warranted the withdrawal of the case from the jury, and a demurrer to the evidence should have been sustained.

Appeal from the Moniteau Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

Wm. S. Shirk, for the appellant.

(1) The demurrer to the evidence should have been given. There was no evidence sufficient to support a verdict, that the fire, which burned plaintiffs' pasture, was started, or set out, by defendant's engine. The most the evidence would justify the jury in doing, would be to guess, or presume, that the railway company's engine may have set the fire out. All the evidence on this point showed was, that the fire originated near the right of way—but it even failed to show that an engine passed that point at any time recently before the fire started. Nor did the evidence show that any engine of defendant, which passed the point at which the fire originated, emitted sparks or fire. There is a total lack of evidence on this point, except that there was a fire, and that it started on or near defendant's right of way. This was not sufficient. "It seems clear that the plaintiff must show first, not only that the fire might have

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originated, but that it did actually originate from sparks or cinders emitted by defendant's engines." (Note to *Railroad v. Shultz*, 2 Am. and Eng. Ry. Cases, page 275, and authorities cited.) This need not be proved by direct and positive evidence, but the circumstances, relied upon in evidence, must be such, as raise a presumption, amounting to proof, that the fire originated from sparks or fire emitted from one of defendant's engines. Here no such surrounding circumstances were shown. *Kenny v. Railroad*, 70 Mo. 243 on 247-8 and 249; *Sheldon v. Railroad*, 29 Barb. 228; *Redmond v. Railroad*, 76 Mo. 550 on 551 and 552; *Brown v. Railroad*, 13 Mo. App. 462; *Railroad v. Dook*, 52 Pa. St. 379; *Ruffner v. Railroad*, 34 Ohio St. 96; *Bochwell v. Railroad*, 6 Am. and Eng. Ry. Cases, 570.

Moore & Williams, for the respondents.

(1) There was sufficient evidence, to go to the jury, to show that the fire was caused by an engine of the defendant. The fire was traced to the right of way and occurred at a time of day when trains were frequently passing. The smoke was seen by the witnesses, and all the surrounding circumstances show how the fire occurred and communicated to the plaintiffs' pasture. *Sappington v. Railroad*, 14 Mo. App. 86; *Martney v. Railroad*, 30 Mo. App. 507; *Redmond v. Railroad*, 76 Mo. 550. (2) There is no element of negligence involved in the burning of the pasture of respondents by fire of appellant's engine. The burning makes the company responsible. Laws of Missouri, 1887, p. 101. Under this act the instructions of respondents placed the question of the cause of the fire and of damages properly before the jury. The damages were not excessive under the evidence; the respondents not only lost the grass burned, but almost the entire use of the pasture not burned, by reason of the burning of the fences, enclosing the same. This was the natural result of the fire and fixes the responsibility. *Miller v. Railroad*, 90 Mo. 389-393-4.

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SMITH, P. J.—Plaintiffs brought suit against defendant to recover damages for the burning of ninety acres of grass and recovered judgment, from which defendant has appealed. At the conclusion of the plaintiffs' evidence the defendant interposed a demurrer thereto on the ground that the same was insufficient to authorize a verdict for the plaintiffs, which was by the court overruled. The defendant declining to introduce any evidence, the jury under an instruction given by the court found for the plaintiffs.

I. The principal question for our decision is whether the evidence of the plaintiffs was sufficient to make out a *prima facie* case, entitling them to a recovery, or rather was there a total lack of evidence showing that the fire which consumed the plaintiffs' pasturage was started by defendant's locomotive engine and train of cars. The evidence adduced tended to show that the fire in question started just inside or near the defendant's right of way and burned along the railroad fence, and from there spread out into the plaintiffs' pasture consuming some seventy-five or eighty acres of it; that the fire proceeded from the southwest and that the grass on defendant's right of way had been mowed but was still tall enough to burn.

The testimony was that the pasture was worth from two hundred and fifty to three hundred dollars. There was some other evidence of about the same purport as the foregoing. This evidence is by no means satisfactory. But can we say that there was no evidence before the jury that the fire which destroyed the plaintiffs' pasture was not started by the defendant's locomotive and train of cars by the emitting of sparks or the dropping of live coals or cinders on the right of way? From the facts and circumstances detailed in evidence cannot the fact be inferred that the fire was caused by defendant's locomotive or train of cars while passing over its

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road at the point where the plaintiffs' pasture was situated? So far as the evidence contained in the record goes there is nothing showing or tending to show that a single locomotive or train of cars passed over the defendant's road on the day of the fire or within a week before its occurrence.

For aught that appears in the record the trains over defendant's road may have on that day ceased to run on account of the destruction of a bridge or for some other cause. Are we as a matter of law to presume that trains passed over defendant's road on the day of the injury complained of, when the witnesses testify that they saw no trains pass that day before the fire?

It may be, and doubtless is, true that trains did pass over that part of defendant's road on that day previous to the occurrence of the fire but there is no evidence of the fact or evidence from which the inference is deducible that such was the case.

If it appeared that a train of cars had shortly before the fire passed over the defendant's road at the point where the witnesses state the fire started, we should feel better satisfied with the verdict. We think there was such total lack of evidence as warranted the withdrawal of the case from the jury.

It follows that the judgment of the circuit court must be reversed and the cause remanded. All concur.

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. F. G. SCHOENNEN *et al.*, Defendants in Error.

Kansas City Court of Appeals, December 2, 1889.

1. **Appellate Practice:** INSTRUCTIONS TAKEN TOGETHER, NOT MISLEADING. Although the instructions given for one party may be subject to criticism, yet, if all the instructions, taken together as a whole, present the case to the jury in an intelligible manner and are not misleading in character, the judgment should not be disturbed.

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3. **Instructions: COMMON FAULT.** A party condones a fault in his opponent's instructions by incorporating the same vice in his own.

Error to the Cole Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

T. J. Portis and *Silver & Brown*, for plaintiff in error.

(1) (*a*) The first instruction for defendants is erroneous, in that it does not confine the value of the land taken to the market value. The damages to be awarded should be the market value of the property for any purpose for which it is adapted, or for which it may be used. Mills on Eminent Domain [2 Ed.] sec. 168; *Railroad v. Woodruff*, 49 Ark. 381; *Railroad v. Jacobs*, 110 Ill. 414; *Railroad v. Railroad*, 112 Ill. 589; *Boom Co. v. Patterson*, 98 U. S. 403; *Bridge Co. v. Ring*, 58 Mo. 49; *Railroad v. Abell*, 18 Mo. App. 637. (*b*) The first instruction given for defendants is further erroneous in that it makes the measure of damages the peculiar value of the land to the defendants. The correct rule is the value of the property for sale, in view of the uses to which it may be put. Mills on Eminent Domain [2 Ed.] sec. 173; *Bridge Co. v. Ring*, 58 Mo. 491; *Railroad v. Doughty*, 22 N. J. L. 495; *Railroad v. Patterson*, 107 Pa. St. 461. (*c*) The first instruction given for defendants is also erroneous, in that it allows the valuation to be made as of the time of the taking, although the value of the land was enhanced by the previous location and building of the road upon it by the license of defendants. The owner is not entitled to the increased value occasioned by the proposed improvement. The value should be estimated irrespective of the proposed improvement. Mills on Eminent Domain [2 Ed.] sec. 174; Pierce on Railroads, p. 219; *Sater v. Road Co.*, 1

Iowa, 386; *Carli v. Railroad*, 16 Minn. 260. If the railroad company has, with the owner's consent or under color of right, made an entry and laid tracks or constructed other works, the owner is only entitled to the value of the land irrespective of such improvements. Pierce on Railroads, p. 219; *Emerson v. Railroad*, 75 Ill. 176; *Justice v. Railroad*, 87 Pa. St. 28; *Railroad v. Devaney*, 42 Miss. 555; *Hendry v. Railroad*, 24 Am. & Eng. R. R. Cases, 286; *Railroad v. Railroad*, 20 Am. & E. R. R. Cases, 309; *Railroad v. Dunlap*, 47 Mich. 456; *Ellis v. Railroad*, 17 N. E. Rep. 62. (2) (*a*) The second instruction given for defendants is erroneous, in that it makes the measure of damages the actual value instead of the market value of the land. Mills on Eminent Domain [2 Ed.] sec. 168; *Railroad v. Woodruff*, 49 Ark. 381; *Railroad v. Jacobs*, 110 Ill. 414; *Railroad v. Railroad*, 112 Ill. 589; *Boom Co. v. Patterson*, 98 U. S. 403; *Bridge Co. v. Ring*, 58 Mo. 491; *Railroad v. Doughty*, 22 N. J. L. 495; *Railroad v. Patterson*, 107 Pa. St. 461; *Railroad v. Ridge*, 57 Mo. 599. (*b*) It is further incorrect in allowing the improvements put upon the land prior to the institution of this proceeding by the plaintiff, with the permission of the defendants, to be taken into consideration in estimating the damages. Pierce on Railroads, p. 219; *Emerson v. Railroad*, 75 Ill. 176; *Justice v. Railroad*, 87 Pa. St. 28; *Railroad v. Devaney*, 42 Miss. 555; *Hendry v. Railroad*, 24 Am. & E. R. R. Cases, 286; *Railroad v. Railroad*, 20 Am. & E. R. R. Cases, 309; *Railroad v. Dunlap*, 47 Mich. 456; *Ellis v. Railroad*, 17 N. E. Rep. 62; *Carli v. Railroad*, 16 Minn. 260; *Sater v. Road Co.*, 1 Iowa, 386; Mills on Eminent Domain [2 Ed.] sec. 174. (3) The fourth instruction is erroneous in submitting to the jury the question of the peculiar value of the land for storing and banking railroad ties and other freights and receiving and forwarding the same. Its value for such purposes was the result only of the location of the road

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upon it by permission of the defendants, and was not an element of damages. Defendants were only entitled to the value of the land in such case irrespective of the improvements. Pierce on Railroads, p. 219; *Emerson v. Railroad*, 75 Ill. 176; *Justice v. Railroad*, 87 Pa. St. 28; *Railroad v. Devaney*, 42 Miss. 555; *Hendry v. Railroad*, 24 Am. & E. R. R. Cases, 286; *Railroad v. Railroad*, 20 Am. & E. R. R. Cases, 309; *Railroad v. Dunlap*, 47 Mich. 456: *Ellis v. Railroad*, 17 N. E. Rep. 62. (4) Plaintiff's and defendants' instructions are inconsistent and cannot stand together. It cannot be told which the jury took for their guide. It is error to give instructions which are repugnant and inharmonious. *Stone v. Hunt*, 94 Mo. 475; *Frederick v. Allgaier*, 88 Mo. 598; *Stevenson v. Hancock*, 72 Mo. 612.

W. S. Pope and *Edwards & Davison*, for the defendants in error.

(1) The evidence in this case is not preserved and plaintiff having in his brief abandoned all questions except the giving instructions for defendants, it will be difficult for the court to understand, as it is for the defendants, upon what ground the reversal is asked. The instructions are fully sustained by the following authorities: 18 Mo. App. 637; 70 Mo. 629; 96 Mo. 611; this case, 622. The measure of damages as laid down in defendants' second instruction is fully authorized by the decisions of our own courts. 90 Mo. 538–544; 70 Mo. above referred to. The measure of damages is not as contended by plaintiff. 57 Mo. 599; 25 Mo. 544; 25 Mo. 276; 53 Mo. 178; 45 Mo. 466. (2) When the instructions, taken together, present the case fairly to the jury, the court will not disturb the verdict. Even though such instructions may be subject to criticism. Taking the instructions in this case together they fairly present the law of the case, and the finding will not be

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disturbed. 94 Mo. 600, especially p. 611; *Reilly v. Railroad*, 56 Mo. 289; *Hoenschen v. O'Bannon*, 52 Mo. 524; *Porter v. Harrison*, 43 Mo. 405; *McKeon v. Railroad*, 43 Mo. 586; 42 Mo. 490. (3) The errors which are alleged against the defendants' instructions are well disposed of in a very able and clear opinion rendered by the presiding judge of this court, and fully answers every possible objection that could be suggested by appellant. We refer to the case of *Railroad v. Vivian*, 33 Mo. App. 583. Especially that part of the opinion on pages 588 and 589. Also a party will not be heard to complain of error in giving an instruction when he leads the court into the error. *Railroad v. Vivian, supra;* 95 Mo. 60. The complaint of plaintiff of defendants' fourth instruction will not be entertained in this court.

Ellison, J.—This is a proceeding instituted by the plaintiff to condemn property of the defendants as being necessary for its use as a public corporation. Plaintiff appeals from the damages assessed against it.

The litigation, if we may rely upon the statement in the briefs, has been quite protracted. The evidence produced below is not preserved and our review of errors alleged is confined to the instructions of which complaint is made.

We have examined these and find that there were none refused for either side, objections being only taken to those given for the defendants. If we were to confine ourselves to those given for the defendants we might readily admit that some of them are fairly subject to criticism, but when we consider them in connection with those given at plaintiff's request, we are inclined to hold that as a whole they present the case tc the jury in an intelligible manner, and that they are not misleading in character. When such is the case the judgment should not be disturbed for that cause. *Reilly v. Railroad*, 94 Mo. 600, 611; *Porter v. Harrison*,

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52 Mo. 524. Complaint is specially urged against instruction number 4, in that it allows damage for any special or peculiar value by reason of the property's front on the Osage river, or for the purpose of storing, receiving and forwarding freight. Without considering whether such instruction is right or wrong, we say that if wrong the error was condoned by plaintiff's third instruction in which the same vice appears. *Railroad v. Vivian*, 33 Mo. App. 583.

After a full consideration of all the points made by appellant we are satisfied that no error was committed materially affecting the merits of the cause, and the judgment will therefore be affirmed. GILL, J., concurs; SMITH, P. J., not sitting.

CITY OF JEFFERSON, Plaintiff in Error, v. E. L. EDWARDS, Defendant in Error. 37 617 / 39 290

Kansas City Court of Appeals, December 2, 1889.

Cities and Towns: ACTION FOR TAXES, HOW BROUGHT: STATUTE CONSTRUED. Section 4386, Revised Statutes, 1879, while it preserves all the property rights of a city passing from under a special charter and adopting the general law for the government of cities of the third class, does not continue the remedy for the collection of delinquent taxes, so that such city can thereafter institute proceedings for the collection of such taxes, theretofore accruing to it, in its own name.

Error to the Cole Circuit Court.— HON. ANDREW ELLISON, Judge.

AFFIRMED.

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F. E. Luckett, and *A. M. Hough*, for plaintiff in error.

The court erred in sustaining defendant's objection to the introduction of testimony on the part of plaintiff, upon the grounds that the city was not the proper party to sue. Laws, 1872, p. 396, sec. 14; *City of Jefferson v. Whipple*, 71 Mo. 519; *City of Jefferson v. McCarty*, 74 Mo. 55; *City of Jefferson v. Mock*, 74 Mo. 61; *State ex rel. v. McDonald*, 38 Mo. 529; *State v. Clark*, 54 Mo. 17; *State v. DeBar*, 58 Mo. 395; *State v. Green*, 87 Mo. 585; *State ex rel. v. Robyn*, 93 Mo. 399.

Pope & Skeen and *Edwards & Davison*, for the defendant in error.

(1) The action of the court in sustaining defendant's objection to the introduction of any evidence was correct. The petition stated no cause of action against defendant. The city of Jefferson, as will appear by one of the allegations in the petition, is a city of the third class, organized under the general laws of the state, and hence contains more than five thousand inhabitants. (See Revised Statutes, section 4382.) Such being the case this suit, if maintainable at all, could only be maintained in the name of the state to the use of the city collector. *State ex rel. v. Hamilton*, 94 Mo. 544; R. S., secs. 6833, 6834, 6835, 6836 and 6837, and 6845. Also *State ex rel. v. Robyn*, 93 Mo. 395, which expressly recognizes the same doctrine. In the case now under consideration the suit, if properly brought by the city collector, must fail for the reason patent upon the face of the petition, and true as a matter of fact, that the city collector failed to return the taxes delinquent as required by law, and a failure of the city to have or keep any back-tax book or delinquent list as required by sections 6845 and 6848, Revised Statutes. *State ex*

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rel. v. Robyn, 93 Mo. 395; *State ex rel. v. Hamilton*, 94 550, and cases there cited by the court. (2) No judgment except one *in rem* can be rendered for taxes on real estate. *Allen v. McCabe*, 93 Mo. 144; *Brockschmidt v. Cavender*, 3 Mo. App. 568; *State ex rel. v. Kerr*, 8 Mo. App. 125; 75 Mo. 442; *State ex rel. v. Bridge Co.*, 73 Mo. 442; Burrows on Taxation, 257. Such being the case a justice of the peace has no jurisdiction. *State ex rel. v. Hopkins*, 87 Mo. 519, especially 528. In each of the suits before the court the plaintiff seeks to enforce the taxes in gross against a number of tracts of ground not contiguous to or used in connection with each other. (3) The collector can only collect taxes in the manner provided by statute. The power to collect is purely a statutory power. *McPike v. Pen*, 57 Mo. 63; Cooley on Taxation, 435, and cases cited, 441, and cases cited, 668, 454. The several questions raised in these cases are treated in *extenso* in Burrows, Cooley and Hilliard on Taxation, and, by each, numerous authorities are cited, to all of which reference is made. The justice of the peace was wholly without jurisdiction and the circuit court acquires none by appeal. *State ex rel. v. Hopkins*, 87 Mo. 519–528; R. S. 1879, sec. 2837.

GILL, J.—This suit was brought in the year 1888 for delinquent taxes of the year 1886. It originated before a justice of the peace, was appealed to the circuit court; and there the question was raised, on objection by defendant to the introduction of any evidence on the complaint, as to whether the plaintiff was authorized by law to bring the action. The circuit court held with the defendant and sustained the objection, whereupon plaintiff took a non-suit with leave to move to set the same aside. In due season such a motion was made, was overruled, and the case brought here by appeal.

The petition alleges plaintiff's incorporation by special act of the legislature, approved, March 27, 1872,

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by which the said city of Jefferson was empowered to levy and collect taxes and to sue for the same; that there was assessed against the property of defendant in the year 1886 certain taxes which he had not paid, and it was further alleged that thereafter, on January 3, 1887, the plaintiff abandoned its special charter, and became a city of the third class under the laws of this state.

It seems then the taxes here sued for were assessed and levied for the year 1886, during the time plaintiff was governed by its special charter, but that when this action was commenced the special charter had been abandoned, and plaintiff was a municipal corporation under the general law for the organization and government of cities of the third class. It seems conceded too that if the prosecution of this action is to be in accordance with the provisions of the old charter of 1872, then it was proper to institute the same in the name of the city of Jefferson. But if to be controlled by the provisions of the general law for the government of cities of the third class, then plaintiff corporation was *not* the proper party to sue. See laws for the government of cities of third class (as amended) Acts of 1887, sec. 76, etc., p. 79, and sections 6833 to 6837, inclusive, Revised Statutes, 1879. While making this concession, however, plaintiff's counsel insist that the right of plaintiff to sue in its own name has been preserved by section 4386, Revised Statutes, 1879. Said section is as follows:

"Sec. 4386. All rights and property of every kind and description, which were vested in any city under its former organization, shall be deemed and held to be vested in such city on its becoming reorganized as provided in the preceding section; but no rights or liabilities, either in favor or against the city, existing at the time of becoming so organized, and no suit or prosecution of any kind, shall be affected by such change, but the same shall stand and progress as if no change had been made.

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We do not concur with the able counsel in this contention. While the legislature intended by this section to preserve to the new corporation all property rights and liabilities, and preserved the right to continue the prosecution or defense of all suits then pending, it was not the purpose to retain the mere form or remedy, as it previously existed, for the enforcement of such rights in the future. The change in the law, as provided in the general law for the government of third class cities, only went to the *remedy* thereafter to be adopted. No property right of the City of Jefferson was disturbed. It was only the manner of the *enforcement* of its right to collect its taxes that was changed. We hold then that this action was improperly brought in the plaintiff's corporate name. It so appeared on the face of the petition, and the objection to the introduction of any evidence thereon was properly sustained. The judgment of the circuit court is therefore affirmed. ELLISON, J., concurs; SMITH, P. J., did not sit in the case.

MARCELLA TINCHER, Appellant, v. JOHN W. PHILLIPS, Respondent.

Kansas City Court of Appeals, December 2, 1889.

Dower: WIDOW'S QUARANTINE: PAROL LEASE. Where a decedent makes a parol contract to rent his homestead for a part of the crop and dies before the lessee in fact enters into the possession, and commences to work under the contract, and his administrator receives such part of said crop and converts the same, the widow is entitled to recover the whole proceeds from the administrator.

Appeal from the Callaway Circuit Court.—HON. G. H. BURCKHARTT, Judge.

REVERSED AND REMANDED.

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Bailey & Tincher, for appellant.

(1) This agreement was an executory one, and, while it may not have been void under the statute of frauds by reason of section 3082, Revised Statutes, 1879, had an entry upon said lands been had during intestate's lifetime, was voidable by either party prior to such entry, and did become absolutely void upon intestate's death prior to such entry. 1 Washburn, Real Prop. [4 Ed.] pp. 613 and 614, sec. 31, 32, 33. (2) The entry upon said lands after intestate's death and with the assent or consent of the widow made the parties her agents or servants. As their terms began when they entered and not before. 1 Taylor's Landlord and Tenant [8 Ed.] pp. 79, 80, par. 68. (3) Intestate died seized of said lands. His widow, upon his death, became seized thereof, and consequently entitled to her quarantine in the whole tract. R. S. 1879, sec. 2205; *Orrich v. Robbins*, 34 Mo. 226; *Roberts v. Nelson*, 86 Mo. 21; *Swain v. Bartlow*, 62 Ind. 546. (4) The widow had the right to farm out these lands (*Stokes v. McAllister*, 2 Mo. 163), and the entry upon these lands after intestate's death and with the assent or consent of the widow, whether tacit or expressed, made the parties her agents, servants or tenants, as may be; hence she and not the administrator was entitled to the rents. (5) The agreement between intestate and the croppers, if not void upon his death for want of entry, did not constitute a lease, in the legal, nor in any, sense of that term, as would debar the widow of her quarantine in the lands in question. The parties took the lands as croppers, not as lessees. The agreement could in no sense constitute an outstanding lease as contemplated in *Orrich v. Robbins*, *supra;* 1 Washburn on Real Property [4 Ed.] secs. 1, 2, p. 572; *Adams v. McKesson*, 53 Penn. St. 83; Boone on the Law of Real Prop., p. 108, sec. 96; *Boone v. Stover*, 66 Mo. 430; *Woodward v.*

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Conder, 33 Mo. App. 147 and 152 ; 1 Taylor's Landlord and Tenant [8 Ed.] p. 44, par. 31, 32, 37, 38 ; *Johnson v. Hoffman*, 53 Mo. 504 ; *Kamerick v. Castleman*, 23 Mo. App. 481. (6) If the agreement between intestate and the croppers did not become void upon intestate's death for want of entry prior thereto, and if the contracts between them and intestate constituted leases, the term of the leases began after intestate's death, to-wit, about the fourteenth of March (See Taylor's Landlord and Tenant, cited on second point), hence the intestate died seized, and the widow became entitled to the entire rents. (7) To oust her of her quarantine there must be an outstanding lease—a lease in its technical sense, and the property in the possession of the tenant, so that deceased husband would die disseized. *Swain v. Bartlow*, 62 Ind. 546 ; *Jones v. Jones*, 81 Ind. 292 ; *Hoover v. Agnew*, 91 Ind. 370.

John A. Hockaday, for the respondent.

(1) A parol lease of land for a period, not exceeding one year, constitutes, under the statute of frauds, a valid and binding contract between the parties. R. S. 1879, secs. 2513, 3081, 3082 and 2509 ; *Kerr v. Clark*, 19 Mo. 132 ; *Ridgley v. Stillwell*, 28 Mo. 400 ; *State v. Forsythe*, 89 Mo. 667 ; 1 Greenleaf's Cruise, pp. 283, 281 ; 2 Smith's Leading Cases, pp. 179–184. (2) Such a contract possesses all the efficacy of a written lease, and confers the same rights upon the parties to it ; and immediate entry is not necessary to preserve such rights. *Hughes v. Hood*, 50 Mo. 350 ; *Austin v. Huntsville Coal Co.*, 72 Mo. 544 ; *Coe v. Clay*, 5 Bingham, 440 ; 1 Platt, Leas. p. 23; Taylor, Land. and Ten. [6 Ed.] p. 11 ; 4 Kent Com. [9 Ed.] p. 97 ; 2 Smith's Leading Cases, p. 177 ; *Lafarge v. Mansfield*, 31 Barb. 345. (3) By the terms of the contract in question, Hugh Tincher, the intestate, had divested himself of the

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possession, or at least the right of possession to the leased lands until the fall of 1888, and his widow succeeded to no greater right to dominion over the premises than he had at the time of his death. Her quarantine rights were suspended, until the right of póssession would have returned to her husband under the contract, if living. This is clearly the spirit of the decision in *Orrick v. Robbins*, 34 Mo. 226; *Michan v. Walsh*, 6 Mo. 346; *Hughes v. Hood*, 50 Mo. 350. (4) The letting of land, for a definite period, for the purpose of cultivation in grain for a share in the crop by way of rent creates the relation of landlord and tenant. Such a contract constitutes a lease and not simply a license. *Kamerick v. Castleman*, 23 Mo. App. 490; *Johnson v. Hoffman*, 53 Mo. 508; *State v. Forsythe*, 89 Mo. 667; *Fenton v. Montgomery*, 19 Mo. App. 156; *Blood v. Spaulding*, 57 Vt. 422; *Hatchell v. Kimbrough*, 4 Jones Law (N. C.) 163; *Rees v. Baker*, 4 Iowa, 461; *Burns v. Cooper*, 31 Penn. State R. 426; *Edson v. Colburn*, 28 Vt. 631; 4 Kent Com. [9 Ed.] 96; *Murray v. Armstrong*, 11 Mo. 210; *Kerr v. Clark*, 19 Mo. 132; *Ridgley v. Stillwell*, 28 Mo. 400; *Allen v. Mansfield*, 82 Mo. 688.

Smith, P. J.—This case originated in the probate court of Callaway county, and was brought here by appeal from the judgment of the circuit court of that county, upon the following agreed statement:

(1) That Hugh Tincher died at said county on the twenty-ninth day of February, 1888.

(2) That he died the owner of lands in said county described in plaintiff's motion.

(3) That he died intestate, and J. W. Phillips is administrator of his estate, and that the lands were rented before Tincher died, but that the renters did not enter upon them, and commence work until after Tincher's death.

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(4) That he left a widow, Marcella Tincher, the plaintiff, and several children. That the dower in lands of deceased has not been assigned to said widow.

(5) That some days or weeks prior to his death he rented, by parol agreement, a large portion of his said lands to several different parties, which lands were a part of home farm on which his mansion house is situated.

(6) That said contracts were that the parties were each to cultivate the land, by them rented, in corn, and as rent to deliver to said deceased two-fifths of the corn grown on each respective part of said lands so rented, and to turn over to said Hugh Tincher the stalk fields when the corn was gathered in the fall of 1888.

(7) That they occupied and cultivated said lands so rented from Hugh Tincher under and by virtue of said contract so made by them and Hugh Tincher, and under no other contract or agreement. That the plaintiff knew of said contract and made no objection.

(8) That under said contracts they were authorized by its terms to enter into possession of said lands at any time, after said rental contracts were made by them and said Tincher, that said lands would do to plow. That they did not commence working said lands however until about the fifteenth of March following.

(9) Except that John Tincher, who took sixty acres of said lands as one of said renters, claims to have commenced work on said lands under said contract before the death of said Hugh Tincher, and so testified. Ed. Tincher testifying that he did not, and the administrator testifying that some plowing had been done on the twelfth of March when he made the inventory.

(10) That all of said renters entered said lands under said contracts.

(11) That said administrator, after the death of said Hugh Tincher, collected the rents due and owing

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under said contracts amounting to $1,601.68, and afterterwards sold the stalks to be pastured on the lands for $112.50.

The cause was submitted to the court on this statement of the facts without any declaration of law.

The court found for plaintiff $533.89—one-third of the proceeds of the sale of the corn and $112.50 the entire proceeds of the stalks, and rendered judgment accordingly.

The substantial question presented by the record in this case, and which we must decide, is whether the plaintiff in virtue of her statutory quarantine rights (R. S., sec. 2205) is entitled to the whole of the proceeds arising from the sale of said rent corn and cornstalks in the hands of the defendant, administrator. If the said parol agreement entered into between the deceased Tincher and the other persons named in said agreed statement of facts was a valid and binding lease at the date of the death of said Tincher, then the question must be answered in the negative. *Orrich v. Robbins*, 34 Mo. 226; *Roberts v. Nelson*, 86 Mo. 21; *Wighley v. Beauchamp*, 51 Mo. 544.

On the other hand if this parol agreement did not constitute an outstanding lease on the plantation, or some part thereof, attached to the mansion house at the date of the death of plaintiff's husband, she is clearly entitled, under the law as it is declared in the adjudged cases just cited, to the whole of the said sum.

This brings us to the consideration of the *questio vexata* in the case which is, was there an outstanding lease of the lands in question at the date of the death of the defendant's intestate, or, which is the same thing, were the said parol demises valid and binding at that time? It will be observed that these demises were for less than a year, and the same were not therefore within the interdict of the statute of Frauds. R. S., secs. 2513. 2509; *Huffman v. Starks*, 31 Ind. 474; *Young v. Drake*, 1 Seld. 463.

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Leases or demises of this kind are valid, and whatever remedies can be had upon them in their character of leases may be resorted to; but of the right to sue the lessees for damages for not exercising their *interesse termini* is not conferred.

And until entry by the lessees the whole estate and the right of possession remains in the lessor, the lessees having but an *interesse termini* and nothing more. *Union Banking Co. v. Gettings*, 45 Md. 181; *Doe v. Walker*, 5 Bar. & Cr. 111; *Edge v. Stafford*, 1 Cr. & J. 391; *Botlen v. Tomlin*, 5 Ala & El. 836; *Lowe v. Ross*, 5 Exch. 553.

The lessees not having entered into the possession of said lands during the life of the lessor, the whole estate therein including the right of possession was in him at the time of his death, consequently there then was and could not be an outstanding lease thereon which barred the plaintiff's statutory quarantine rights in respect thereto.

It results from these considerations that the plaintiff is entitled to the whole of the proceeds in the hands of the defendant administrator, arising from the sale of said rent corn and cornstalks.

The judgment of the circuit court will therefore be reversed, and the cause remanded to be proceeded upon in accordance with the law as declared in this opinion, which is ordered accordingly. All concur.

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ELIZA C. BELCH, Respondent, v. PHIL. T. MILLER, Appellant.

Kansas City Court of Appeals, December 2, 1889.

Appellate Practice: SECOND APPEAL: RES ADJUDICATA. When a case has been decided in the appellate court and again comes to such court on appeal, or by writ of error, only such questions will be noticed as were not determined in the previous decision; what was passed upon at the former hearing will be deemed *res adjudicata*, and no longer open to dispute or further controversy.

Appeal from the Cole Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

F. M. Brown, for the appellant.

(1) The clause in the contract which was admitted by the circuit court in evidence over the objection of the defendants provided that defendants should "excavate and remove the earth from the lower end of said pond to the extent of one acre, so as to deepen the bottom thereof sufficient to support fish therein the year round." It is vague and uncertain in that specifications are omitted therefrom; that it is wanting in detail; that material matters are left so obscure and undefined that its meaning cannot be ascertained with sufficient certainty; and it is therefore void and cannot be made the basis of an action. Bishop Cont. [Enlarged Ed.] secs. 316, 390; *Adkins v. Van Buren*, 77 Ind. 47; Chitty on Contracts, 77; 1 Greenleaf Ev., sec. 300; *Palmer v. Albee*, 50 Iowa, 429; *Culver v. Culver*, 39 N. J. 574; *Taylor v. Williams*, 45 Mo. 80; *Underwood v. Underwood*, 48 Mo. 527; Pomeroy on Contracts, sec. 145. (2) No court could direct a specific performance of this clause of the

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contract. *Blanchard v. Railroad*, 31 Mich. 43; *Railroad v. Lewis*, 76 Va. 833; *Magee v. McManus*, 12 Pac. Rep. [Cal.] 451; *Schneling v. Kenisel*, 45 Wis. 325; *Nichols v. Williams*, 22 N. J. Eq. 63; *Cholsan v. Thompson*, 2 Wheat. 336; *Bowman v. Cunningham*, 78 Ill. 48; Fry on Spec. Perf., sec. 317; 1 Story, Eq. Jurisp., sec. 767; *Taylor v. Portington*, 7 De Gex; McNatchen and Gordon's Reports, 328; *Dunkart v. Rinehart*, 89 N. C. 354; Chitty on Contracts [9 Am. Ed.] top p. 107; *Dingman v. Kelley*, 17 Ind. 717; *Baldwin v. Kerlin*, 46 Ind. 426; *Sherman v. Kitsmiller*, 7 Serg. & R. 45; *Zaleski v. Clark*, 44 Conn. 218; *Thompson v. Ray*, 46 Ala. 224. (3) The ambiguity in the clause in said contract under consideration is patent, and cannot be cured by the introduction of extrinsic parol evidence. *Palmer v. Albee*, 50 Iowa, 429; *Campbell v. Johnson*, 44 Mo. 250; *Jennings v. Brizeadine*, 44 Mo. 334; *Bradley v. Packet Co.*, 13 Peters, 89; 1 Bouvier's Law Dic. [5 Ed.] 95; 1 Greenleaf Ev., sec. 297; 2 Johnson's Natural History, 419 *et seq.;* Essay in Classification (Agassiz), 187; 9 American Encyclopedia, 158; Webster's Unabridged Dictionary—Fish. (4) There was no injury alleged for which compensation could be awarded, and in such case could not possibly recover more than nominal damages. 1 Sutherland on Dam. 9. (5) An implied contract or an implied obligation may be so vague and indefinite as to be incapable of enforcement. *Jones v. Durgin*, 16 Mo. App. 370.

McIntyre & Lemmon, for the respondent.

(1) (*a*) The question presented in the former appeal was then decided and adjudicated, and it is well settled that the question thus adjudicated becomes the law of the case throughout all subsequent proceedings therein, and it will not be reconsidered. Wells, Res Adjudicata and Stare Decisis, secs. 613, 614 and

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615; *Stacy v. Railroad*, 32 Vt. 552. (*b*) A new organization of the court so that the members constituting it are of different opinion, concerning the points of law decided, will not justify a departure; the decision still remains the permanent law of the case. Wells on Res Adjudicata and Stare Decisis, sec. 616 and cases cited. (*c*) And this is true where there is a decision and reversal, and, after a second trial, the case comes upon a second appeal. *Ib.*, sec. 617 and cases cited. (2) When a case has once been in the appellate court and is sent back, if it is re-tried in conformity with the principles announced in the higher tribunal, and is again taken up, cogent and convincing reasons must exist to induce a re-examination of what ought to be considered as *res adjudicata*, and so this case was tried, and no reasons whatever, cogent and convincing or otherwise, have been shown by appellants why the court should reconsider its opinion. *Bank v. Taylor*, 62 Mo. 338; *Hamilton v. Marks*, 63 Mo. 167.

GILL, J.—This is the same case that was before this court for review about a year ago (*Belch v. Miller*, 32 Mo. App. 387); and we are asked to pass again on the identical question—and the only question—which was then, and is now, presented by the record and briefs—and that question was then, and is now, whether the contract sued on is sufficiently definite and certain to support an action.

That question was decided, at the former hearing, in the affirmative, the cause was remanded to the lower court and tried in full recognition of that ruling. The point is *res adjudicata*, so far as this cause is concerned, and this court will not further consider the question.

"When a case has been decided in this court and again comes here on appeal, or by writ of error, only such questions will be noticed as were not determined in the previous decision; whatever was passed upon at the

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former hearing will be deemed as *res adjudicata*, and no longer open to dispute or further controversy." *Overall v. Ellis*, 38 Mo. 209; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Hamilton v. Marks*, 63 Mo. 167; *Conroy v. Iron Works*, 75 Mo. 651; *Hombs v. Corbin*, 34 Mo. App. 393; *Lane v. Railroad*, 35 Mo. App. 567.

From peculiar circumstances noticed in *Hamilton v. Marks* (*supra*) the supreme court of this state departed from the rule. However, we have nothing here suggested that should withdraw this case from its operation. We have here the same point presented in the same case, and upon the same briefs, referring to the same authorities and none other. And that, too, after one decision by this court and a review thereof on a motion for a rehearing. Let the judgment of the circuit court be affirmed. ELLISON, J., concurs; SMITH, P. J., not sitting.

KELLY R. CHANDLER, Respondent, v. WILLIAM C. WEST, Appellant.

Kansas City Court of Appeals, December 2, 1889.

1. **Chattel Mortgage:** RIGHTS OF MORTGAGEE AND VENDEE. A mortgagee cannot maintain replevin or trover against the subsequent mortgagee or vendee of his mortgagor before default or other condition broken.

2. ——— : RULE AS TO DESCRIPTION. Where the recording of a mortgage. as under the statute takes the place of actual delivery of the mortgaged property, the mortgage to be effectual must point out the subject-matter of it so that a third person by its aid together with the aid of such inquiries as the instrument itself suggests, may identify the property covered by it, and the property itself must be of such nature, and so situated, as to be capable of being specifically designated and identified by the written description.

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3. ——— : RULE AS TO DESCRIPTION APPLIED. Where there is nothing in the mortgage to distinguish "ten head of cattle, mixed lot, cows, heifers and steers," from any other property of the same kind, the description is insufficient.

4. ——— : ——— : PAROL EVIDENCE. And such mortgage will not support an action for "one white roan milk cow about six years old," etc., as parol evidence would be required for identification, which would be adding to the mortgage a term not contained in it.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge

REVERSED.

W. W. Fry, for the appellant.

(1) Plaintiff had neither the legal title nor right to possession, and he cannot recover in trover. *Myers v. Hale*, 17 Mo. App. 204. (2) Plaintiff's debt not being due and by the terms of the mortgage the mortgagor being entitled to the possession, and, having possession, had the title, which he could mortgage or sell, and had an interest which might be seized under process and sold, and the mortgagee or purchaser take the possessory right and title of the mortgagor. *Bank v. Metcalf*, 29 Mo. App. 391, and cases cited; *Hickman v. Dill*, 32 Mo. App. 517; *State to use v. Carroll*, 24 Mo. App. 361. (3) If plaintiff was apprehensive that the property would be eloigned prior to maturity of his demand (of which there is no evidence) his remedy was injunction. *Hickman v. Dill*, 32 Mo. App. 517. (4) Plaintiff cannot maintain trover where, as here, no condition of the mortgage was broken, and when plaintiff's debt was not due when the suit was instituted. *Bank v. Metcalf*, 29 Mo. App. 393. Nor can he maintain replevin. *Hickman v. Dill*, 32 Mo. App. 516. Defendant's acts were not inconsistent with plaintiff's rights and there was no conversion. *Allen v. McMonagle*,

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77 Mo. 478; *McCoy v. Hyatt*, 80 Mo. 130. (5) The description of the property was insufficient and the mortgage inoperative as to defendant. Plaintiff's mortgage describes the property as "ten head of cattle, mixed lot, cows, heifers and steers." The evidence discloses the fact that there were other cattle on mortgagor's premises at the time. The description is not such that a third person, by its aid together with the aid of such inquiries as the instrument itself suggests, may identify the property covered. *Stonebraker v. Ford*, 81 Mo. 532; *Hughes v. Menefee*, 29 Mo. App. 204; *Lafayette Bank v. Metcalf*, 29 Mo. App. 394. The demurrer to the evidence should have been sustained, and the verdict is against the evidence.

No brief for the respondent.

SMITH, P. J.—The plaintiff brought suit against defendant in the circuit court of Audrain county for the wrongfully taking and converting to his own use "one white roan milch cow about six years old, three two-year-old steers, two two-year-old steers and one yearling steer," whereby he was damaged in the sum of five hundred dollars. The answer denied generally the allegations of the plaintiff's petition.

About the only questions presented by the record arise on the defendant's demurrer to the plaintiff's evidence.

The plaintiff, to maintain the issue, gave in evidence a mortgage executed to him by one Kessler on the eleventh day of April, 1888, on the following described personal property, to-wit, "ten head of cattle, mixed lot, cows, heifers and steers," to secure the paymen of a promissory note of even date with said mortgage made to him by said Kessler, and due six months after date. It was provided in the mortgage that the plaintiff should have the power to sell said property if Kessler made default in the payment of said note, or

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should remove said property from the county of Audrain. It was stipulated in the mortgage that Kessler should remain in the possession of the property until default in the payment of the note.

The defendant, in July, 1888, sold the cattle described in plaintiff's petition under a junior mortgage at which sale he became the purchaser. This suit was brought in September, 1888. There was a verdict and judgment for plaintiff from which defendant appealed.

I. The main ground of the appeal is that as this suit was brought by the plaintiff for the conversion of the cattle before the said Kessler had made default in the payment of the mortgage debt that the same cannot be maintained. We think this ground of contention is well founded. By the express terms of the mortgage Kessler, the mortgagor, was to remain in possession of the property until he made default in the payment of the debt, or until he removed the property out of said county, neither of which contingencies had happened when the suit was instituted. The possession at the time of the alleged conversion by the defendant was in the mortgagor under the letter of the mortgage itself.

The mortgagor then had the title to the property, and, having the possession, he had a vendible interest therein, an interest which was subject to seizure and sale under process, or under the defendant's junior mortgage. If the plaintiff's mortgage was a prior subsisting lien on the property, any such sale thereof would be subject to the plaintiff's mortgage.

The sale of the equity of Kessler on the property by the defendant, under his junior mortgage and purchase by him, could have no other effect than to place defendant in the shoes of Kessler in respect to that equity. *Lafayette Bank v. Metcalf*, 29 Mo. App. 384; *Bennett v. Timberlake*, 57 Mo. 501; *State ex rel. v. Carroll*, 24 Mo. App. 361.

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It certainly cannot be contended that the act of the defendant or Kessler, as shown by the evidence, rendered the plaintiff's debt due, or conferred upon him any power other than that provided in the mortgage. Until default by Kessler in the payment of the note or the removal of the property out of the county, he could not foreclose his mortgage, nor was he entitled to the possession thereof as against Kessler or his vendee. He could not maintain replevin or trover. *Hickman v. Dill*, 32 Mo. App. 509; *Strebble v. Curdt*, 56 Mo. 437. The suit of the plaintiff, being before default or conditions broken, was premature and unauthorized, and cannot be maintained.

II. It is also objected that the description of the property contained in the plaintiff's mortgage is so vague and uncertain as to be inoperative as to the cattle involved in this suit. The rule, deduced from the authorities here and elsewhere, is that when the recording of a mortgage, as under the statute takes the place of actual delivery of the mortgaged property, the mortgage, to be effectual, must point out the subject-matter of it so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered by it. The articles mortgaged must be of such nature and so situated as to be capable of being specifically designated and identified by the written description. *Stonebraker v. Ford*, 81 Mo. 532; *Hughes v. Menefee*, 29 Mo. App. 204; *Lafayette Bank v. Metcalf*, 29 Mo. App. 394; *Black v. Williams*, 16 Pick. 35; *Golden v. Cockerell*, 1 Kansas, 259; *Fowler v. Hunt*, 44 Wis. 345; *Winter v. Lamphere*, 42 Iowa, 471; Jones on Chat. Mort. 55.

It cannot be pretended that the description in the mortgage in question meets the requirements of these rules, or that the property in the petition mentioned can be identified as being the same as that described in

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the mortgage. There is nothing in the mortgage to distinguish these "ten head of cattle, mixed lot, cows, heifers and steers," from any other property of the same kind.

If the property alleged to have been wrongfully converted is the same as that described in the mortgage, the mortgage does not prove it. This would have to be proved by parol testimony, and thus adding to the mortgage a term not contained in it, which is not permissible under the law in relation to mortgages.

It follows from what has been said that the judgment of the circuit court must be reversed, which is ordered accordingly. All concur.

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WM. L. LAYSON *et al.*, Respondents, v. JOHN P. WILSON, Appellant.

Kansas City Court of Appeals, December 2, 1889.

1. **Damages:** BREACH OF WARRANTY: INSTRUCTIONS. In an action for the breach of warranty of a jack, the measure of damages is the difference between his value as warranted at the time and place of sale and his value as he was, and where an instruction taken in connection with the evidence clearly indicates that the value should be fixed at such time and place, it is sufficient, though it may not use the words, "value at the time and place of sale."

2. ———: INSTRUCTION: EVIDENCE OF VALUE: PRICE. And such instruction is good although the only evidence of value at such time and place is the price then and there paid.

3. **Weight of Evidence:** CREDIBILITY OF WITNESS: DUTY OF JURY. The jury in determining the weight of evidence, and settling the conflicts of testimony, are not confined alone to the mere credibility of the witnesses, but should consider the evidence in the light of all the circumstances and of reason aided by experience and the ordinary transactions of men.

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Appeal from the Audrain Circuit Court.—Hon. E. M. Hughes, Judge.

Affirmed.

Statement of the case by the court.

This is an action on the warranty of the qualities of a jack sold by defendant to plaintiffs. The matters of complaint are fully set out in plaintiffs' petition, the substance of which is as follows:

"That on or about the tenth day of February, 1887, in consideration that plaintiffs would buy a certain jack for the sum of five hundred dollars from defendant, he undertook and promised that the said jack was sound and a good, sure foal getter, and a quick jack to cover any mare inside of fifteen minutes without the aid or influence of a jennet. That plaintiffs relying on said warranty of said defendant * * * bought the said jack of the said defendant, and paid him the five hundred dollars. * * * That said jack at the time of said purchase was not sound, and was not a good, sure foal getter and was not a quick jack to cover, and that he would not cover a mare in fifteen minutes without the aid or influence of a jennet, and would not cover at all at any time without the aid of a jennet, and was entirely worthless without a jennet, contrary to said promise, warranty, etc., and that plaintiffs were deceived, etc. That plaintiffs have incurred heavy charges and expenses in transportation, keeping and feeding said jack and in having said jack examined and taken care of and in matters incidental thereto, and that said jack is of no value to these plaintiffs. That plaintiffs have sustained one thousand dollars damages by the said breach of warranty and undertaking by said defendant, for which plaintiffs ask judgment."

The answer was a general denial. The case was submitted to the jury under instructions from the court,

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the jury found for the plaintiffs and assessed their damages at five hundred and fifty-one dollars and twenty-five cents, and after the unsuccessful motion for a new trial defendant appealed to this court.

Barker & Shackelford and *John M. Barker*, for the appellant.

(1) The first instruction given by the court on its own motion was erroneous, because there was no evidence in the cause tending to show that defendant had ever represented the jack as a sure foal getter. (2) The second instruction given by the court was erroneous, because there was not a particle of evidence in the case to show what the cash value of the jack was at the time or place of sale. *Sterns v. McCulloch*, 18 Mo. 411; *Soper v. Breckenridge*, 4 Mo. 14. And because the instruction assumes that defendant made the "representations" claimed by plaintiff. *Peck v. Ritchey*, 66 Mo. 114; *Jones v. Jones*, 57 Mo. 138; *Hall v. Johnson*, 57 Mo. 521; 39 Ill. 26; 44 Ill. 355; 83 Ill. 150; 52 Ala. 395; 94 U. S. 610; 59 Ind. 105; 21 Minn. 442; 44 Ia. 343. (3) The court erred in refusing to give the defendant's instruction to the effect that if plaintiff and defendant were of equal credibility the verdict should be for the defendant for the reason there was no evidence in the case as to the alleged warranty except Mr. Layson affirmed it and Mr. Wilson denied it. (4) The court erred in overruling defendant's motion for a new trial. Because the verdict was against the evidence—indeed there was no evidence at all to show what such a jack (as claimed to be represented) was worth at the time and place of sale. (5) Instruction number 2 was erroneous and should not have been given as there was no evidence in the cause on which to base such instruction —there was no evidence as to the actual value of the jack at the time and place of sale—nor was any evidence

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offered in the cause as to the value of the jack at the time and place of sale, if it had been such a jack as plaintiff alleged defendant represented it to be. The said instruction number 2 did not direct the jury's mind to the time and place of sale, in arriving at the amount of damages, the said instruction only went to the place of sale regardless of the time of sale. Story on Sales [4 Ed.] sec. 454.

W. O. Forrist and *Sol. Hughlett*, for the respondent.

The instruction given by the court of its own motion does fix the rule of damages for breach of the warranty to be the value at time and place of sale. There was ample evidence for this instruction to apply. The agreed price was evidence of the value of the jack if he had been equal to the warranty at the time and place of sale. So the evidence that the jack was worthless was evidence tending to show him of no value when and where the sale was made, and the record discloses other items of evidence so tending.

Gill, J.—From an examination of the record of this case we discover no substantial reason for disturbing the judgment of the circuit court. Defendant's counsel make some complaint as to the two instructions given by the court of its own motion, but it seems the court thereby fairly presented the issues made by the pleadings, and suggested by the evidence, for both parties to the cause. By instruction number 2 the jury were correctly advised that the measure of damages, if they found for plaintiffs, was the difference between the value of the jack if he had been as warranted and his value as he was.

Although the court did not use the words "*the value at the time and place of sale*," yet the words of

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the instruction taken in connection with the evidence, clearly indicated that such value should be fixed at the *time* as well as the *place* of sale. Defendant's counsel further complain of this second instruction, requiring the jury to determine the *quantum* of damages by reference to the value of the jack at the time of sale if he had been as represented, because counsel say that there was no evidence whatever as to what was the value of the jack if he had been as warranted. It is true, as counsel state, that the only evidence tending to fix such value is the price agreed upon and paid at the time of purchase. This, however, is quite persuasive evidence of such value. The price paid is regarded as strong evidence of the value of the animal, at the time and place of purchase, if sound and of the quality represented by the vendor. *Cary v. Gruman*, 4 Hill. 625; *Fisk v. Hicks*, 31 N. H. 535; *Page v. Parker*, 40 N. H. 48.

II. It is further claimed by the defendant that the trial court erred in refusing to give the defendant's instruction to the effect that if plaintiff Layson and defendant Wilson were of equal *credibility* the verdict should be for the defendant. The theory, upon which this instruction was asked, was, doubtless, that as the burden of proving that defendant warranted the animal sold was on plaintiffs, and that as Layson gave one and Wilson another version of the transaction, the jury should have found the issue for defendant, *if both witnesses were equally credible.* But the jury in determining the weight of evidence, and settling conflicts of testimony, are not confined alone to the mere *credibility* of the witnesses adduced at the trial. It is equally the province of these triers of the facts to consider the evidence, as given by the witnesses, in the light of all the circumstances—to consider the same in the light of reason—which story better consists with experience and the ordinary transactions of men—to observe the conduct of the witnesses on the stand, etc., and by these determine

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where the truth resides. Juries are not bound in settling such conflicts in the evidence "to count noses."

Hence the court, in this case, very properly refused to so instruct the jury, as requested by defendant.

Detecting no substantial error in this record, we affirm the judgment of the circuit court. The other judges concur.

CYRUS E. GREEN, Respondent, v. JOHN F. STEPHENS *et al.*, Appellants.

Kansas City Court of Appeals, December 2, 1889.

1. **Damages, Measure of:** VALUE OF PROPERTY SEIZED. In an action for the wrongful taking from and not returning to plaintiff of certain school books, the measure of damages is the value of the property at the time it was seized; and if, after such seizure, the books were returned, then the measure of damages was the difference in their value at the time of the seizure and at the time of the return.

2. **Instructions Approved.** Instructions examined, criticised and approved, where the issue made by the pleadings was, "Did the defendants take plaintiff's goods and not return them?"

3. **Damages:** MITIGATION OF: SEIZURE UNDER LEGAL PROCESS. In an action for wrongful taking of goods, the fact that defendant as constable attempted to attach such goods, but plaintiff while in possession recovered judgment for possession constitutes no defense but is only matter in mitigation of damages.

Appeal from the Clinton Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

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B. F. Ellis and *Thos. E. Turney*, for the appellants.

(1) The court erred in instructing the jury to find for the plaintiff. The answers set up a complete defense to the action alleged in the petition, and every allegation in the answers is proved by the testimony of two witnesses. *Twohey v. Fruin*, 96 Mo. 104, and cases cited. The plaintiff by his agreement with the constable retained possession and control of the goods levied on, and exercised absolute dominion over a part of them by selling the show cases without consulting the constable. If there was not a legal levy the plaintiff held the goods by virtue of his purchase from Hamilton & Co. If there was a legal levy he held them as agent for the constable. In either case he has no cause of action against the defendants for the value of the goods. (2) The instruction given by the court of its own motion is not only not warranted by anything in the petition or evidence, but it is also inconsistent with the only defense set up in the answers. *Raysdon v. Trumbo*, 52 Mo. 35; *White v. Chancy*, 20 Mo. App. 380.

Thos. J. Porter, for the respondent.

(1) There being no conflict in the evidence as to the ownership of the goods, or as to the fact that they were seized by the constable by direction of the attorney of Fible, Crabb and Todd, the court rightly instructed the jury to find for the plaintiffs. The trespass is not only admitted in the answers of all the defendants, but is proven by the constable and his assistant, Ewing. (2) The issues made by the answers of defendants do not go to plaintiff's right to recover for the trespass, but only to the measure of his damages. Plaintiff could have maintained his action for the trespass if the goods had been restored a moment after the seizure. 1 Addison

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on Torts, 541. (3) The instruction given by the court of its own motion contains nothing of which defendants could justly complain. *Kreher v. Mason*, 25 Mo. App. 291. (4) The fact that respondent prosecuted his interplea for the attached property does not bar his action in trespass for its value. *Perrin v. Clafflin*, 11 Mo. 13; *Clark v. Brett*, 71 Mo. 473. (5) The judgment is obviously for the right party, and the judgment will not be reversed because of errors which could not injure the defendants, or where there is no evidence worthy of consideration to sustain the defense. *Billisimer v. McCoy*, 1 Mo. 318; *Chouteau v. Uhrig*, 10 Mo. 62; *Walter v. Cathcart*, 18 Mo. 256; *Pasley v. Kemp*, 22 Mo. 409; *State v. Vaughn*, 26 Mo. 29; *Otto v. Bent*, 48 Mo. 23; *Bassett v. Glover*, 31 Mo. App. 150.

SMITH, P. J.—This was a suit brought by the plaintiff against the defendants for wrongfully taking from the possession of plaintiff and not returning to him certain school books, etc. The answer was a general denial. The answer also contained the further allegation that defendant Stephens in his quality as constable attempted to attach the goods mentioned in the petition, under a certain writ of attachment in his hands, but that the said goods were not taken out of the plaintiff's possession; that plaintiff while in the possession of said goods recovered judgment for the possession of the same in the circuit court of Clinton county, etc. There was considerable evidence introduced on both sides of the case at the trial.

The plaintiff's evidence tended to show, that the goods were seized, that they were the property of the plaintiff, that they were taken from the shelves of his store, nailed up in a box and placed in Dr. Hamilton's office, that the plaintiff was compelled to litigate his title to the property in the justice's court and follow an appeal to the circuit court from a judgment in his favor, where it pended until three or four months after he had

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sold his store and that when he sold in January, or February, 1885, the constable was notified of the fact that another proprietor was in possession of the store and that the attached goods remained in Dr. Hamilton's office, that the plaintiff told the constable at the time of the seizure he would not be responsible for the goods, which were not returned to the plaintiff; that the plaintiff left the books in Dr. Hamilton's office where the constable had placed them. The show cases were never moved, but left on the counter of plaintiff's store when the constable made his levy. The witness Dr. Hamilton testified that, after plaintiff sold out his store, the constable Stephens came to him, and asked permission to let the books remain in his office, to which he consented. There was evidence by defendants which in many respects conflicted with that offered by the plaintiff. There was some evidence as to the value of the books.

The complaint made by the defendant here is that the circuit court erred in its declaration of law, given at the instance of the plaintiff.

The first of these instructions told the jury that if they believed that the constable Stephens seized the books in controversy on said writ of attachment at the request of the attaching plaintiffs, defendants here, or their attorney, and placed them in the building occupied by the plaintiff as a drug store, and that they were put there by the constable for safety and before any dissolution of said attachment, the plaintiff sold said drug stock and delivered the possession thereof to the purchaser, reserving no right of control over the same, and that the constable knew of the change of such possession of said drug store, and that there was no restoration of the property sued for by the constable, then they should assess the damages at the value of the property at the time it was seized.

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The other instruction told the jury that if the constable had returned the attached property that the measure of damages was the difference in the value of the property between the time it was seized and the time it was returned, etc. The defendants make no complaint on account of the action of the circuit court in refusing their instructions.

In respect to the instructions given by the court it seems to us that no substantial objection has been pointed out to them. They were supported by evidence, or at least it cannot be said that there was no evidence upon which to base them. The rule for the admeasurement of the damages therein declared is unexceptionable.

Under these instructions the jury were authorized to find that there had been no seizure of the goods under the attachment. If they believed from the evidence that the constable had not taken the plaintiff's goods out of his possession under the attachment they were not precluded by said instructions from finding for the defendants. The issue made by the pleadings was, "Did the defendants take the plaintiff's goods and not return the same?" This was the issue with reference to which the instructions were framed, and upon which the case was submitted to the jury. There was no defense independent of the denial set up by the answer. The facts there specially pleaded were only in mitigation of the damages.

The instructions are possibly subject to slight verbal criticism, but upon an examination of the record we are unable to discover any errors committed by the trial court that have operated to the prejudice of the defendants, or that justify us in reversing the case. The judgment, we think, is for the right party, and must be affirmed.

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JOSEPH W. REED, Respondent, v. JAMES W. NICHOLSON *et al.*, Appellants

Kansas City Court of Appeals, December 2, 1889.

1. **Promissory Notes: FAILURE OF CONSIDERATION: INSTRUCTION.** In an action on a promissory note where the defense was a failure of consideration, in the plaintiff's refusal to assign defendant certain stocks, the court examines an instruction complained of as assuming the proper transfer of said stock, and holds it cannot be said that said instruction contains such assumption, and if defendants had any fear the jury would misunderstand said instruction they should have asked an instruction announcing what is a legal transfer.

2. ——: PAROL AGREEMENT NO DEFENSE. A contemporaneous parol agreement is not admissible to vary or alter the terms of a note absolute on its face and complete in its terms, and such agreement can constitute no defense.

Appeal from the Clinton Circuit Court. — HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

F. B. Ellis, for the appellants.

(1) The court erred in giving instruction number 5, and not instructing the jury as to what would be a legal and valid transfer of the creamery stock, there being evidence to the effect that the sixty-three shares of stock was a part of the consideration of the note. *Huff v. State*, 4 S. W. Rep. (Tex.) 890; *Blondeau v. Sheriden*, 81 Mo. 545; *Lumber Co. v. Warener*, 93 Mo. 374. (2) Interpretation of a written contract is for the court. Whether the creamery stock had been properly assigned or not was a question for the court and not for the jury. *Michael v. Ins. Co.*, 17 Mo. App. 23. (3) The jury should not have been left to conjecture as to whether

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the creamery stock had been legally assigned from Reed to Nicholson or not; this was a question of law. *Anderson v. Pike*, 86 Mo. 293; *Bank v. Crandel*, 87 Mo. 208. (4) Instructions should not be given which leave to the jury to determine questions of both law and fact. *Jordan v. The City of Hannibal*, 87 Mo. 676; *Albert v. Besel*, 88 Mo. 150. The instruction complained of assumes that there had been a proper transfer of the creamery stock. Instructions which assume controverted facts are erroneous and should not be given. *Rothchilds v. Frensdorf*, 21 Mo. App. 318; *McGinniss v. Railroad*, 21 Mo. App. 399. (5) Defendants White and Ralls should have been permitted to prove that they signed the note as security, and the conditions upon which they signed the note were that they were to be released August 1, and plaintiff to take a mortgage on defendant Nicholson's land. Where a promissory note is made and delivered to be held on a condition, it does not become a binding obligation until the condition has been fulfilled, and parol evidence to prove the condition does not contradict the note nor seek to vary its terms. *McFarland v. Sikes*, 7 Atlantic R. P. (Conn.) 408.

John A. Cross, for the respondent.

(1) The compromise and dismissal of the suit between this plaintiff and defendant, James M. Nicholson, was a sufficient consideration for the note herein. *Jasper County v. Travis*, 76 Mo. 13; *Parker v. Enslow*, 102 Ill. 272; *Jones v. Brittenhouse*, 87 Ind.; *Cook v. Murphy*, 70 Ill. 96; Bishop's Contracts, sec. 57. (2) The consideration of the note being in issue, and conflicting evidence on the question, it was a question for the jury to determine whether a consideration had been satisfactorily proved. *Swain v. Ettling*, 32 Pa. St. 486; *Grove v. The City of Kansas*, 75 Mo. 672; *Price v. Chamberlin*, 82 Mo. 618; *Roscrans v. Railroad*, 83 Mo.

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678. (3) Parol evidence is not admissible to show that a note, payable absolutely, was only to be paid on certain conditions. *Jones v. Jeffries*, 17 Mo. 576; *Blackburn v. Harrison*, 39 Mo. 303; *Mossman v. Holcher*, 49 Mo. 87. (4) Parol evidence is never admissible for the purpose of discharging the parties to a written contract. *Inge v. Hance*, 29 Mo. 399; *Cuthbert v. Bowie*, 10 Ala. 163; *Thompson v. Davenport*, 2 Smith's Ld. Cas. 371. (5) The makers of a promissory note cannot, when sued thereon by the payee, set up a contemporaneous oral agreement that the note was not to be paid as therein stated. *Frissell v. Mayer*, 13 Mo. App. 331. (6) An agreement that a note is not to be paid at maturity, but is to be returned to the makers, and another note, secured upon real estate, to be accepted (in lieu thereof) by the payee, is a defeasance, and can only be proved by a writing. *Gardner v. Matthews*, 11 Mo. App. 269; *Adams v. Wilson*, 12 Metc. 138; *Penny v. Jolly*, 12 Ill. 287.

Ellison, J.—This case originates on a promissory note, and plaintiff had judgment in the trial court.

Defendants' answer fully discloses their defense, and it is here inserted.

"Defendants, for answer to plaintiff's amended petition, deny each and every allegation therein, except as hereinafter admitted. Defendants admit the execution of the note filed herein as alleged in plaintiff's petition, but say that the consideration for which said note was made was that plaintiff agreed to legally and properly assign, transfer and deliver to defendant, James M. Nicholson, sixty-three shares of Lathrop creamery stock; that plaintiff has refused and failed to so legally assign, transfer and deliver said creamery stock to defendant James M. Nicholson; that the said defendant has received nothing for said note; that it was wholly without consideration. Defendants, Geo. W. Ralls and John D. White, further answering for and on

behalf of themselves, say that they made said note as security and for the accommodation of defendant Nicholson and Joseph W. Reed, without consideration, upon the conditions hereinafter set forth. That the plaintiff, Joseph W. Reed, and defendant, Nicholson, agreed with the defendants, Geo. W. Ralls and John D. White, that they should be released from all liability from the payment of said note, after the first day of August, 1887, by plaintiff, and that in lieu thereof the plaintiff was to accept a new note from defendant Nicholson, secured by mortgage on certain real estate owned by defendant Nicholson, and which plaintiff agreed was ample security for the payment of said note; that upon these conditions defendant Ralls and White made said note; that the plaintiff wholly neglected and refused on the said first day of August, 1887, to comply with these conditions, and refused to take any steps to enforce collection of said note or to comply with his agreement with defendant and James M. Nicholson, and refused to deliver the creamery stock as set forth in defendants' answer. Defendants say that said note is wholly without consideration, wherefore they pray judgment for costs and for all proper relief."

There are two points urged here against the correctness of the trial below:

First. That the court in giving the following instruction assumed that the transfer of creamery stock had been properly made, viz.: "If the creamery stock spoken of in the evidence had been transferred and delivered to Nicholson in the original land trade, then the defendant could not retransfer and deliver back said stock to Reed without the knowledge and concurrence of Reed.

"The jury will determine from the evidence what the consideration for the note was, and then determine whether there has been in whole or in part any failure of consideration. If the jury find from the evidence

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that the consideration for the note was the compromise of a suit in court between Joseph W. Reed and J. M. Nicholson, and that Joseph W. Reed should relinquish to Nicholson, by deed, any claim he made to the land involved in said suit, and that he made such deed, then there is no failure of consideration. If the jury find that it was also a part of said consideration that Nicholson was to have the creamery stock, for which the land was originally conveyed to Reed, and that Reed failed and refused to deliver to Nicholson said stock, then there would be a failure of consideration to the extent of the value of such stock; if said stock had been turned over to Nicholson by Reed in the original land trade, Nicholson could not transfer it back to Reed by writing a transfer on the stock or by having an assignment entered upon any stock-book unless Reed accepted such transfer back to him; it could not be turned back to him without his consent and acceptance; if it had not been turned back to him by his consent and acceptance, then there was no transfer necessary from Reed to Nicholson; but if it had been transferred back to Reed by his consent and accepted by him, and he agreed as a part of the consideration of the note to transfer and deliver it to Nicholson and failed and refused to do so, this would be a failure of consideration to the extent of the value of such stock."

We cannot say there is any assumption in this instruction as to a proper assignment of the stock. As the stock matter was the base of defendant's charge of failure of consideration, and they had any fear that the jury would misunderstand the instruction complained of, they could, with all propriety, have asked an instruction announcing what were the requisites to a legal transfer.

Second. That portion of the answer which alleges a contemporaneous agreement with defendant Ralls and White, whereby they were to be released from liability

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on the first day of August following the date of the note, is wholly without merit. Oral agreements, not distinguishable in principle from this, have been repeatedly held by this court and the supreme court as not admissible to vary or alter the terms of a note absolute upon its face and complete in its terms. The judgment is affirmed. All concur.

William Jennings, Respondent, v. The St. Joseph & St. Louis Railway Company, Appellant.

Kansas City Court of Appeals, December 2, 1889.

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Railroads: KILLING STOCK: DEPOT GROUNDS. In an action against a railroad under section 809, Revised Statutes, 1879, plaintiff's evidence tended to show that the cow killed got upon the track within a space outside the town limits and between the head of the switch and the cattle-guard—a distance of one hundred and forty feet, and defendant's uncontradicted evidence showed that the cattle-guard and the fence could not be placed nearer the head of the switch without hindering the transaction of its business and endangering the lives of its employes in switching its trains, *held*, plaintiff could not recover.

Appeal from the Ray Circuit Court.—Hon. James M. Sandusky, Judge.

Reversed.

G. Lathrop, C. T. Garner, Sr., & Son, S. W. Moore, for the appellant.

Where the undisputed evidence shows that the distance between the cattle guard and the switch cannot be lessened without endangering the lives of the railroad

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company's employes, the company is not required to fence, and is not liable for the killing of stock occurring there under section 809, Revised Statutes. *Pearson v. Railroad*, 33 Mo. App. 543; *Lloyd v. Railroad*, 49 Mo. 199; *Railroad v. Willis*, 93 Ind. 507; *Kneadle v. Railroad*, 19 A. & E. R. R. Cas. 568; *Allen v. Railroad*, 5 A. & E. R. R. Cas. 620; *Snow v. Railroad*, 8 Allen, 441; *Lewis v. Railroad*, 59 Mo. 495.

J. W. Shotwell, for the respondent.

(1) Defendant was bound to erect good and substantial fences on the sides of its road, between the town line and cattle-guard, or else pay for damages to stock straying on the road, section 809, Statutes of 1879. In *Pearson v. Railroad*, 33 Mo. App. 543, the cattle-guard was one hundred and twenty feet south of the switch head; in this case it is from one hundred and fifty to one hundred and sixty feet, and the distance from the town line to cattle-guard is twenty-eight feet. The cow was struck, from the weight of testimony, within ten feet of cattle-guard, and from the testimony the cattle-guard could have been placed the twenty-eight feet further east. In this case the cow was struck in open grounds and not beyond the cattle-guard. (2) All stock, except a few prohibited of the male kind, may run at large and enter any unenclosed lands without committing a trespass, whether it be the stock of the owner or others. In this state it is the duty of owners of premises to fence out stock by a lawful fence, and no stock is guilty of a trespass except over a lawful fence. Sections 5652 and 5655, Statutes, 1879. *Farris v. Railroad*, 30 Mo. App., does not apply to the facts of this case and the same is true of the other authorities cited by defendant.

GILL, J.—This is an action for damages brought under section 809, Revised Statutes, 1879, for killing

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plaintiff's cow at a point on defendant's railroad where, it is alleged, a duty rested on defendant to fence its tracks, and which duty had not been performed.

The evidence discloses that the cow entered upon the track of the railroad, and was killed near the western corporate limits of the town of Lawson. The jury evidently found that such entry was just outside the town limits. The railroad passes through the town east and west, with a depot located about six or seven hundred feet east of the western town limits. A side track is constructed along from the depot east and west, connecting by switches with the main track at either end. The right of way of the railroad is fenced to within twenty-eight feet of the western town limit where there is a cattle guard, which is about one hundred and thirty-five to one hundred and forty feet west from the west end of the switch. This space from the cattle-guard on the west to the cattle-guard east of the depot is left open and unfenced. Plaintiff's contention is that the cow entered upon the space of twenty-eight feet outside the town limits (and there is evidence tending so to show), and that as it was not fenced the railroad company is liable in double damages for the injury committed. Defendant's position is that it was not in duty bound to fence this space, since in order to transact its business at the depot and protect its employes in handling trains at the switch the cattle-guard and fencing could not safely be permitted nearer to the depot and switch grounds than as located.

This defense of the railroad company was clearly and uncontrovertibly established by the evidence, and we must hold that no case was made against the defendant, for the same reasons as heretofore declared by this court in a controversy "on all fours" with the case now under review. *Pearson v. Railroad*, 33 Mo. App. 546. By the evidence adduced at the trial of this cause, it remains uncontradicted, that a placing the cattle-guard and fencing nearer to the head of the switch than

as constructed would endanger the lives of the employes in switching trains about the depot grounds at Lawson. As said in *Pearson v. Railroad*, *supra:*—"If a railroad company wilfully places that in its track which will unduly hazard the life and limb of its employe in the performance of the service required of him, it is liable to such servant for an injury thereby occasioned. This being true, it is altogether out of the question to hold such company liable in another direction for *not* doing so."

The learned judge who tried this case very clearly submitted instructions covering this theory of the defense, and if the evidence had not been entirely one way we should not disturb the judgment. But there is no conflict in the evidence. A clear defense was made out, without a scintilla of testimony against it, and the court should have declared to the jury that the plaintiff could not recover.

Judgment reversed; all concur.

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JOHN W. SHOTWELL *et al.*, Respondents, v. THE ST. JOSEPH AND ST. LOUIS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 2, 1889.

Railroads: FENCING RIGHT OF WAY. Where defendant has operated its road for years through a field, and has never built fences along the sides of its right of way, but only placed a cattle-guard at its entry into such field, and in repairing and improving its road bed and track, it removes said cattle-guard for a week or more, and stock passed into said field and destroyed the crop, defendant is liable under section 809, Revised Statutes, 1879, and cannot defend by the fact it kept a watchman there, or on the theory that it is entitled to a reasonable time to repair fences along the right of way, after the discovery of defects.

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Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

Statement of the case.

This is an action under section 809, Revised Statutes, 1879, to recover damages for injuries to a crop of corn done by stock escaping from defendant's unfenced right of way. The suit was commenced before a justice of the peace where plaintiffs had judgment—was appealed to the circuit court, where, on trial anew, plaintiffs again recovered, and defendant has appealed to this court.

The material averments of the petition are as follows: "Plaintiffs further state that the railroad of defendant passes through a field of standing corn on the southwest quarter of section nine in township fifty-one of range twenty-seven in Richmond township, Ray county, Missouri, a little north of Lexington Junction, in said county, all of which corn was owned by plaintiffs except three or four acres in the southeast corner of the field owned by one Mansfield Gordon; that said field was enclosed with a fence all around it, and where the railroad passed into the field was a cattle-guard to protect said field from stock; that about the fifteenth of November, 1887, defendant, by its agents and servants, tore out said cattle-guard and partitions of the fence on each side of the railroad, and permitted it to remain open and in a condition that the said stock could pass into said field without hindrance or obstruction for the space of two or three weeks; that during that time stock passed through said opening into said field, and destroyed corn belonging to plaintiffs to the value of seventy-five dollars; plaintiffs say that said railroad was not fenced on the side thereof through any part of said field, and that defendant failed to maintain said cattle-guard at the entrance of said field and to erect fences

on the sides of said road, and, for want of said cattle-guard and fences and the acts and doings of the agents and servants of defendant, cattle and other stock passed through said opening, and destroyed corn as aforesaid to the value of seventy-five dollars. That by reason of the premises aforesaid plaintiffs say they are damaged in the sum of seventy-five dollars, for the double of which they ask judgment, according to the statute in such case made and provided, and for all proper relief." The court, of its own motion, gave the following instructions:

(1) If they believe from the evidence that the plaintiffs owned an enclosed field of corn in the south-west quarter of section 9, township 51, range 27, in Richmond township, Ray county, Missouri, in the year 1887, and believe that said field of corn was not within the limits of an incorporated town, and believe that defendant's railroad at said time ran through said enclosed fields, and believe that defendant had failed to build any fence along either side of its right of way, where it runs through said field, and believe that by reason of defendant's failure to build and maintain fence along its right of way through said field, cattle and other stock strayed and escaped from defendant's right of way into said field of corn, in said year 1887, at the point where said right of way entered said field of corn, and injured or destroyed plaintiff's corn, then the jury will find for the plaintiffs and assess their damage at such sum, not exceeding the amount claimed, as the evidence may show their corn was injured by said cattle and stock.

(2) Unless the plaintiffs, by a preponderance of testimony, have established the matters set out in the first instruction to the jury, they should find for the defendant.

(3) If the jury find for the plaintiffs, they cannot assess against defendant any damages which may have

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been done to the corn by cattle or other stock breaking into the field through plaintiff's fence, but only such damages as may have been done by stock escaping into plaintiffs' corn from defendant's right of way, where it enters or passes through said field, from a failure on defendant's part to fence its right of way where it passes through said field.

The defendant asked the court to give certain instructions which were refused.

From the testimony it appears plaintiffs' field, consisting of one hundred and forty acres, is situated immediately north of the station on defendant's road designated by the witnesses as the "Junction," and that defendant's road passes through the same in a northerly direction. Although thus constructed for several years there was never, up to the time of the damage complained of, any fence erected along the right of way through plaintiffs' field, but on the south side, where the railroad entered the field, defendant had maintained a cattle-guard, which joined to the fences on on either side was the only barrier against stock entering on defendant's right of way, where it passed through plaintiffs' field, and thence into said field. During the months of October and November, 1887 defendant, while constructing a side track on this right of way through the plaintiffs' field, tore out the cattle-guard and short spans of fencing connecting with the adjacent fences, and thereby exposed the field of corn to the incursions of stock from the commons.

Plaintiffs' witnesses testify that the premises remained in this condition for quite two weeks. Defendant admits it so remained for about eight to ten days. There was evidence tending to show that cattle broke into plaintiffs' field over their own inferior fencing, and it would appear from the verdict of the jury that they found that a *portion* of the damages arose from that source. It is undisputed, however, that stock did invade the corn field from the right of way.

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G. Lathrop, C. T. Garner, Sr., & Son, S. W. Moore, for the appellant.

(1) The statement filed with the justice must allege, by direct averment or by necessary implication, that the injuries complained of did not occur within the limits of an incorporated city, town or village. *Nance v. Railroad*, 79 Mo. 196; *Schultz v. Railroad*, 76 Mo. 324. (2) A railroad company in the original construction of its road, or in the subsequent extension or repair thereof, is allowed a reasonable time within which to construct fences. The court's instruction number one ignored this, and was therefore erroneous. *Mayberry v. Railroad*, 83 Mo. 667; *Young v. Railroad*, 82 Mo. 427; *Morris v. Railroad*, 79 Mo. 367; *Rutledge v. Railroad*, 78 Mo. 286; *Silver v. Railroad*, 78 Mo. 528; *Clardy v. Railroad*, 73 Mo. 576. (3) Instruction number one, asked for by defendant, stated the law correctly, and should have been given. *Silver v. Railroad*, 78 Mo. 528. (4) It was neither averred nor proved that the place, where the alleged damage occurred, was not within the limits of an incorporated city, town or village. This is a fatal defect. (5) The statement is defective in not averring that plaintiffs are adjoining land-owners, or otherwise alleging facts from which a duty to fence would arise in favor of plaintiffs. The statute is for the benefit of adjoining land-owners. *Ferris v. Railroad*, 30 Mo. App. 124; *Berry v. Railroad*, 65 Mo. 172; *Harrington v. Railroad*, 71 Mo. 384; *Johnson v. Railroad*, 80 Mo. 620; *Bushy v. Railroad*, 81 Mo. 49; *Stanley v. Railroad*, 84 Mo. 631; *Peddicord v. Railroad*, 85 Mo. 160; *Carpenter v. Railroad*, 25 Mo. App. 110; *Smith v. Railroad*, 25 Mo. App. 113.

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John W. Shotwell and *James E. Ball*, for the respondents.

(1) The petition states a good cause of action, and it is not necessary to allege that a field of one hundred and forty (140) acres is not within the limits of an incorporated town or city, the petition averring that the field lay north of Lexington Junction. *Tickell v. Railroad*, 90 Mo. 296, and authorities there cited; *Ringo v. Railroad*, 91 Mo. 667; *Mayfield v. Railroad*, 91 Mo. 296, and authorities cited; *Maze v. Railroad*, 87 Mo. 278. *Nance v. Railroad*, 79 Mo. 166, and *Schultz v. Railroad*, 76 Mo. 324, cited by appellant in their brief do not apply to the facts in this case. (2) The court was right in giving the first instruction asked for by plaintiffs. Defendant was bound to fence their right of way, and are responsible in double damages, under section 809, Revised Statutes of 1879 of the state of Missouri, for all damages done to the crops in said field by stock escaping from the right of way on the same, and were responsible the moment they took away the fence and cattle-guard on the south side of plaintiffs' field, by stock coming into said field through said opening. *Silver v. Railroad*, 78 Mo. 528; *Rutledge v. Railroad*, 78 Mo. 286. (3) Instruction number one asked for by defendant was properly refused by the court. See authorities cited above. (4) The petition avers that the plaintiffs owned the crop in the field through which said railroad passes, and the proof shows that plaintiff Shotwell was the owner of the field, consequently it was not necessary to aver in the petition that they were adjoining land-owners.

GILL, J.—I. There can be no doubt as to the sufficiency of the plaintiffs' complaint. *Williams v. Railroad*, 80 Mo. 597; *Tickle v. Railroad*, 90 Mo. 296; *Ringo v. Railroad*, 91 Mo. 667. These decisions furnish a complete answer to points 4 and 5 of defendant's brief.

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II. The other points urged in brief of counsel, for a reversal of this case may be answered by review of the court's action in refusing to give defendant's instruction number 1, which reads as follows:

"1. The court instructs the jury that the defendant had the legal right to build and erect side tracks and switches, and to change and remove its main track and to change or remove its cattle-guard on its right of way along its road, and if the jury believe from the evidence that it was necessary for the defendant to erect and build side tracks and switches and remove its main track in order to conduct and carry on its business at Lexington Junction, and that, by the erection of said switches or side tracks, it was rendered necessary to remove its cattle-guard where the railroad entered the field of plaintiff Shotwell, and if the jury find from the evidence that the fence was opened across defendant's right of way, where the railroad enters the field of said plaintiff Shotwell, only for the purpose of erecting said switches and side tracks, and changing the main track of defendant's road, and the said fence was kept open long enough to erect said switch and side tracks, and change the main track of said road, and further believe that said side track and switches and change of main track, and change of cattle-guard, was made and completed without unnecessary delay, and further find that defendant used reasonable care, prudence and diligence, in making said switches and side tracks and change of main track and removal of cattle-guard, to prevent stock from entering the field of plaintiff at the opening of said fence where it crosses defendant's right of way, then there was no failure on the part of defendant to construct or maintain fence or cattle-guards in this case within the meaning of the law, and the jury will find for the defendant."

This instruction is evidently framed on the theory of law, declared by repeated decisions in this state, that

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railroad companies will be permitted reasonable time to repair fences along the right of way, after discovery of defects, or after such condition might have been discovered by the exercise of reasonable care. Hence it is insisted, that, as the necessity arose to tear out the cattle-guard, in order to construct needed side tracks and switches at the point where defendant's road entered the field of plaintiffs, then defendant had a reasonable time to put in such side tracks and replace the switch, which if done was a complete defense to plaintiffs' action.

This case, however, rests upon no such limited ground. Plaintiffs' ground of complaint is not so much on account of the absence of the cattle-guard as the absence of a fence along defendant's right of way, where it passed through plaintiffs' corn field. It seems there never had been any fence erected along this right of way through plaintiffs' field, but to avoid this, for sake of economy likely, the railroad company had put in a cattle-guard at point of entry, thereby to shut out cattle from the right of way and hence protect plaintiffs' field from invasion, of stock. The cattle-guard was a cheap substitute for the fence required by the statute. Immediately upon the opening of this railroad through plaintiffs' field, an imperative duty was imposed on defendant to erect and maintain a lawful fence on both sides of the right of way.

But this duty was not performed, and hence when cattle got upon the right of way, by reason of casting out the cattle-guard, a clear way was opened for incursions into plaintiffs' corn field.

The rule that the railroad company had time to repair has no application, since there had never been any fence, at any time, along the right of way through plaintiffs' premises. *Morris v. Railroad*, 79 Mo. 367. The obligation to fence was concurrent with the necessity which arose at the instant the road was opened up through

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this field. *Silver v. Railroad*, 78 Mo. 528; s. c., 21 Mo. App. 5.

Defendant's road master, Noland, testified: "The company did not have any fence on the east and the west side of the track along their right of way through this field. There never had been any fence. We could have built fences along the right of way through the field, but we put a watchman there. We did not know the right of way. I did not think it necessary to fence the right of way as I had put a watchman there. Stock could not have gotten in very well if we had fenced the right of way."

But the plaintiffs were entitled to a *lawful fence* along the sides of the right of way,—the statute law so provides. It is no defense to say that a *watchman* was placed on guard instead. Neither is there *a shadow* of reason to claim, as suggested, that the work of constructing these side tracks could not have been prosecuted on a fenced right of way.

The court very properly refused defendant's instruction, quite intelligently and clearly informed the jury as to the law of the case, and we can discover no reason for disturbing the judgment. It is therefore affirmed. All concur.

MANSFIELD GORDON, Respondent, v. ST. JOSEPH & ST. LOUIS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 2, 1889.

Railroads: FENCING. The judgment in this case is affirmed on the authority of *Shotwell v. St. Joseph and St. Louis Railway Company, ante*, p. 653.

Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

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Briefs, the same as in *Shotwell v. Railway Co.*, *ante*, p. 653.

Smith, P. J.—The essential facts in this case are the same as those in the case of *John W. Shotwell et al. v. St. Joseph and St. Louis Railway Company*, and the reasons stated in that case why the judgment should be affirmed are applicable, and must control the disposition of the appeal in this case. Judgment of the circuit court will be affirmed. All concur.

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GEORGE E. DUGAN, Appellant, v. JULIA E. S. SCOTT, *et al.*, Respondents.

Kansas City Court of Appeals, December 2, 1889.

1. **Error Coram Nobis, Office of:** DEATH OF DEFENDANT. The office of a writ of error *coram nobis* is to bring to the court's attention and correct some error of fact which did not appear in the record, and which was unknown to the court. such as, that one of two defendants was dead at the time of entering judgment, as in this case.

2. **Mechanic's Lien:** CONSTRUCTION OF STATUTE: PRIORITY OF LIEN: MORTGAGE. Under sections 3172, 3173 and 3174, Revised Statutes, 1879, where improvements and repairs are made upon buildings on the land when a prior mortgage was executed, the lien for such repairs and improvements are subject to such prior mortgage, but if the building, erection or improvement is an independent affair, not in existence when the mortgage was taken, it will be subject to the "mechanics' lien" in preference to such prior mortgage and may be sold and removed.

3. ——— : SUIT TO ENFORCE: ADJUSTMENT OF LIENS. A suit to enforce a mechanic's lien is not the proper proceeding, as upon a bill in equity, to adjust the priority of liens, yet when the question of priority necessarily comes up, as an incident of the case, the court *ex necessitate rei* passes upon it.

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Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

Statement of the case.

In 1881, one Joseph D. Sicher was the owner of a tract of land in the city of Sedalia, known as "Sicher's Park," on which there were at that time erected, and in existence, a certain hotel and other buildings, all constituting a part of the realty. On July 13, 1881, said Sicher and wife executed two deeds of trust upon the land and the buildings thereon, one securing a debt to one Henry Leyser, and the other securing a debt to one John Leyser. These deeds of trust were duly recorded the day of their date in the recorder's office of Pettis county, Missouri. Some years after that Sicher conveyed the property to Julia E. S. Scott, subject to the above deeds of trust. Some time after she had acquired the title in the above manner, Mrs. Scott, a married woman, through her agent, employed the plaintiff to do certain painting and glazing upon the buildings before mentioned. Not receiving his pay for the same, the plaintiff, about August, 1886, filed his account and affidavit under the statute for the purpose of securing a mechanic's lien upon the buildings upon which the above work was done; and thereafter, on the fifth of November, 1886, brought suit to enforce the same, making Mrs. Scott, and her husband, A. D. Scott, and also the two Leysers, beneficiaries in the aforesaid deeds of trust, and the trustee, defendants. The Leysers lived in the state of Illinois, and service was not obtained upon them for considerable time after the suit was commenced. Default having been made in the payment of the deeds of trust, before mentioned, they were foreclosed on February 5, 1887. They being of equal rank a joint sale was made under both deeds of trust, at which John

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Leyser became the purchaser, and, on said fifth day of February, 1887, received a trustee's deed. Later on the same day service was had in plaintiff's suit upon Henry Leyser, who was in Sedalia to attend the trustee's sale as aforesaid. A copy of the petition and summons was sent to Illinois, and served upon John Leyser by the sheriff of the county in which he lived, on the seventeenth day of March, 1887.

The two Leysers had considerable property in Sedalia, Missouri, which was looked after and cared for almost exclusively by Henry Leyser, and they had an arrangement with a firm of attorneys, at Sedalia, by which said attorneys collected their rents, looked after their business and gave them advice generally, and attended to any business they had in court, when directed to do so. Henry Leyser, as soon as served on February 5, notified one of the attorneys of the fact and directed him to look after the interests of himself and brother. The Leysers supposed that the attorneys were attending to their interests in plaintiff's suit. Leyser is a German who speaks very poor English; and whom it is very difficult to understand. The attorney testified that he had no recollection of being directed to appear in the plaintiff's suit, and that he did not so understand Mr. Leyser. No answer was ever filed for either of the Leysers, and judgment by default was entered against them.

John Leyser died in the state of Illinois on March 17, 1888, and afterwards, without any revival of the suit against him, and without any one in court to represent him, the plaintiff caused a judgment (not personal against any of the defendants) to be entered at the May term, 1888, of the circuit court of Pettis county, wherein the court declared the plaintiff to be entitled to a lien for the amount of work done by him upon the hotel and other buildings on the aforesaid land, and that such lien was superior and prior to the lien of the deeds of trust

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made in 1881 in favor of the two Leysers, and ordered the said buildings to be sold with the right in the purchaser to remove the same from the ground. Afterwards, about December, 1888, without any notice to the representative of John Leyser in Illinois, where administration had been taken out on his estate, and without any notice to any one interested in said Leyser's estate, the plaintiff caused Clopton, public administrator of Pettis county, to be put in charge of the estate of John Leyser in Missouri, and then served upon him a *scire facias* to show cause why the aforesaid judgment should not stand revived in his name, as administrator of John Leyser, and why execution should not issue thereon; thereupon the said Clopton, as administrator, at the January term, 1889, filed a return to said *scire facias*, setting forth the above facts, and asking that said cause be revived in his name for the purpose of allowing him to file a motion, in the nature of a writ or error *coram nobis*, to set aside the said judgment, and permit an answer to be filed. Upon the hearing of said return the defendant Clopton made proof of the above facts, and thereupon the court revived the cause in his name, and granted leave to file motion as above indicated. The administrator then filed his motion, setting forth the same facts, and asking that the judgment theretofore entered in said cause be set aside, and that leave be granted him to file an answer. Upon the hearing of which motion proof was made of the facts as above stated, and the court sustained the motion and granted leave to defendant Clopton to file an answer, in said cause, and thereupon he did file an answer, setting up substantially the facts as set forth in the said motion. Upon the trial of the issues the same facts were again proven, as upon the *scire facias* and the motion aforesaid; and the court thereupon made a finding that, under the law and the evidence, the plaintiff was not entitled to a lien upon said buildings, all of which were on said

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land at the time of the making of the aforesaid deeds of trust, and upon which the plaintiff had made repairs for which he was claiming a lien.

E. J. Smith, for the appellant.

(1) Was it proper to hear evidence *dehors* the record to show John Leyser was dead when judgment was taken? We say it was error. *Phillips v. Evans*, 64 Mo. 17; approved in *Rankin v. Lawton*, 17 Mo. App. 574; *Brewer v. Dinwiddie*, 25 Mo. 351; *Harber v. Railroad*, 32 Mo. 423. At the same time does the return to *scire facias* or the motion of plaintiff, or all of them, show any good reason why the judgment should have been set aside? We say not. See the same authorities. (2) Can the court in this proceeding determine and adjust priorities between the lienor and the mortgagee or one holding under the mortgage? And did not the court attempt to do so in this case? We say the court cannot, and yet it did so attempt. *Steininger v. Raeman*, 28 Mo. App. 594; *Chambers v. Benoist*, 25 Mo. App. 520; *Fischer v. Auslyn*, 30 Mo. App. 316. (3) If the court can adjust priorities in this case, then is not plaintiff's lien entitled to priority over John Leyser holding under the deeds of trust? We say he is so entitled. R. S., secs. 3172 and 3174; *Heidigger v. Milling Co.*, 16 Mo. App. 327; *Whitnock v. Noe*, 11 N. J. Eq'ty, 321; *Lime & Cement Co. v. Morrison*, 13 N. J. Eq'ty, 133; *Otley v. Haviland, Clark & Co.*, 36 Miss. 19; *Smith v. Moore*, 26 Ill. 392; *Gatty v. Casey*, 15 Ill. 189; Gen. Stat. Ill. of 1858, secs. 1, 17 and 30, pp. 156-8-9; *Crandall v. Cooper*, 62 Mo. 478; *Smith v. Phelps*, 63 Mo. 585; *Hotel Co. v. Sauer*, 65 Mo. 279; *Bidwell v. Clark*, 39 Mo 170; *Denny v. Bennett*, 9 S. C. Rep. 134; 28 Cent. Law Jour. 78; *Henry and Coatsworth Co. v. Evans*, 10 S. W. Rep. 868, *Syllabus* in 28 Cent. Law Jour. 411, par 93. (4) As the judgment rendered at first was the

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right judgment, and if set aside a new judgment of the same import should have been rendered, it was error to set aside the first judgment. Freeman on Judgments, sec. 498. This error was especially grievous as the court at last refused plaintiff any judgment.

Jackson & Montgomery, for the respondent.

(1) The court committed no error in setting aside the judgment, and permitting the administrator of the deceased defendant Leyser to file answer. A motion, in the nature of writ of error *coram nobis*, will lie to set aside a judgment, for irregularity or error of fact, after the term at which it was rendered. *Powell v. Gott*, 13 Mo. 459; *Stacker v. Cooper Co. Ct.*, 25 Mo. 401; *Latshaw v. McNees*, 50 Mo. 381; *Randalls v. Wilson*, 24 Mo. 76; *Craig v. Smith*, 65 Mo. 536; *Ex parte Gray*, 77 Mo. 160; *Walker v. Deaver*, 79 Mo. 664–674; *State ex rel. v. Heinrich*, 14 Mo. App. 147; *Peak v. Shasted*, 21 Ill. 137; *Kemp v. Cook*, 18 Md. 130; *Wynne v. The Governor*, 1 Yerger, 149; *Holford v. Alexander*, 12 Ala. 280 (see note to same case in 46 Am. Dec. 257). (2) The defendant Leyser having died before the judgment was entered, there was such irregularity and error of fact as warranted the court in setting aside the judgment. Freeman on Judg., secs. 94 and 153; *Calloway v. Nifong*, 1 Mo. 223; *Dows v. Harper*, 6 Ohio, 518. And such irregularity, or error of fact, may be shown *dehors* the record. *Dewitt v. Post*, 11 Johns. 460, and authorities cited above; *Pratt v. Canfield*, 67 Mo. 48. (3) Having set aside the judgment, the court properly allowed the administrator of the deceased defendant to file answer. (4) Upon the facts shown the plaintiff was not entitled to a lien with priority over the deeds of trust to the Leysers, and the deeds of trust having been foreclosed, and the property bought in by the deceased defendant, John Leyser, prior to the first judgment, nothing remained upon which any lien in favor of plaintiff could

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attach; consequently the court properly declared the law, and rendered the proper judgment. R. S., secs. 3172, 3173 and 3174; *Crandall v. Cooper*, 62 Mo. 478; *Haeussler v. Thomas*, 4 Mo. App. 463; *Getchell v. Allen*, 34 Iowa, 559. (5) The court did not undertake to adjust priorities, but only to determine whether or not the plaintiff was entitled to any lien at all under the circumstances. *Steininger v. Raeman*, 28 Mo. 594-602. (6) As Mrs. Scott was a married woman, no personal judgment could be rendered against her, hence the court could not render any judgment, whatever, in favor of the plaintiff

Ellison, J.—This is a proceeding in the nature of a writ of error *coram nobis* begun in the circuit court of Pettis county. By reference to the statement in the cause, it will be seen that the party defendant, principal in interest in the cause, died after service had upon him, but before the judgment was rendered. He had made no appearance to the suit, and the fact of his death was not known to the court at the time of rendering the judgment, and nothing from which it could be ascertained appeared of record until this proceeding originated. It is from this latter fact that complaint is made by plaintiff in the original cause, that the court erred in setting aside the judgment it had theretofore rendered. The contention being that nothing can be heard *dehors* the record to establish the fact of defendant's death. If this contention be true, then, not only is the form of the proceedings on a writ of error *coram nobis* abrogated, but the remedy, or very substance of the writ itself, is gone. For the writ was always brought into requisition to correct some error of fact which *did not* appear in the record and which was *unknown* to the court. The only authority which has been cited having any bearing on the case is *Phillips v. Evans*, 64 Mo. 17, which does appear to lend countenance to the contention. But in the light of cases

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before and since that, we are not inclined to think the court intended to be understood to say that the proceedings in the nature of a writ *coram nobis* could be made effectual only when the matter complained of appeared of record. When the common understanding has always been that its chief object is to bring out those matters not appearing of record.

The court in that case was construing section 26, page 1062, Wagner's Statutes, and there is no doubt the construction now sought to be placed upon it was not thought of by the court, as the case went up to them merely on a motion to quash an execution. This proceeding is not for irregularity, but for error; and it has been held not to be governed by the section of the statute referred to. *Powell v. Gott*, 13 Mo. 459; *Latshaw v. McNees*, 50 Mo. 381. This writ has been held to be the remedy when the judgment was against a married woman as though single, an infant as though of age, an insane person as though sane, or in a criminal proceeding sentencing a prisoner, under age, to the penitentiary. Authorities *supra*, and *Randolph v. Wilson*, 24 Mo. 76; *Walker v. Deaver*, 79 Mo. 664, 674; *Heard v. Sack*, 81 Mo. 610; *Ex parte Toney*, 11 Mo. 662. And, also, when one of two defendants was dead at the time of rendering judgment, it was held to be the only remedy. *Calloway v. Nifong*, 1 Mo. 223; *Dows v. Harper*, 6 Ohio, 518. We have therefore no hesitation in declaring that the circuit court was right in entertaining this proceeding and in hearing evidence *aliunde* the record to establish the fact of defendant Leyser's death.

II. The next question involves the construction of the mechanics' lien law as applied to those who make repairs on buildings, which, with the land upon which they are situated, are mortgaged at the time the improvements or repairs are made.

By section 3172, Revised Statutes, 1879, every mechanic who, under contract with the owner, performs

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work or furnishes material for any building upon land, or for repairing the same, has a lien, for such work or material, upon such building, erection or improvement, and upon the land belonging to such owner upon which the same are situated. By section 3173, the land aforesaid upon which the building or improvement is situated shall be subject to said lien only to the extent of the title or interest the owner of the building, erection or improvement has in it.

Section 3174 gives the lien on the building, erection or improvement a preference over any prior lien upon the land upon which the building has been put. We conclude that this contemplates a building or improvement which has been put on the land *since* the prior lien, as, otherwise, it would not have said prior lien on the land; for, if the statute contemplated the building put up before, it would have read prior lien on the land *and building*.

So, taking the three sections together, our opinion is that, since a mortgage or deed of trust on land, upon which there is a building, covers the building as well as the land, the lien for repairs or improvements, which are put upon such existing building, will be subject to the prior lien of the mortgage or deed of trust; otherwise one's principal security might be repaired or improved from under him. But if the building, erection or improvement is an independent affair, not in existence when the mortgage was taken, it will be subject to the "mechanics' lien" in preference to the mortgage which may have theretofore existed on the land, and it may be sold and removed as provided by statute.

In the case at bar, the buildings were in existence upon the land when the deeds of trust were given, and the repairs and improvements, for which the mechanics' lien is sought to be enforced, were painting and glazing, and, as such, such lien is subject to the prior deeds of trust, and the circuit court was right in so declaring.

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Haeussler v. Thomas, 4 Mo. App. 463; *Hall v. St. Louis Mfg. Co.*, 22 Mo. App. 33. And a similar statute of Iowa, the supreme court of that state has construed in the same way. *Getchell v. Allen*, 34 Iowa, 559.

III. While it is true that a suit to enforce a mechanic's lien is not the proper proceeding as upon a bill in equity, to adjust and determine priorities of liens, yet when the question of priority necessarily comes up, as an incident in the case, arising from its peculiarity, the court *ex necessitate rei* passes upon such question as necessary to a full determination of the case. And so it has frequently been held.

We are of the opinion the judgment should be affirmed, and it is so ordered. All concur.

CATHARINE GILMER, Respondent, v. JAMES GILMER, Appellant.

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Kansas City Court of Appeals, December 2, 1889.

Divorce: SEPARATION BY COMMON CONSENT, NO GROUND FOR. Neither husband nor wife can make a separation, which was begun and prolonged by their common act and consent, and which neither has ever made an effort to terminate, a ground of complaint for divorce from the other.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED, (*with instructions to dismiss*).

Samuel Boyd, for the appellant.

(1) The petition does not state facts sufficient to show that the circuit court of Saline county had jurisdiction to hear and determine this suit, in that it does

not state that plaintiff was a resident of the county of Saline at the time of the institution of this suit, nor does the whole record show that fact. It being a jurisdictional fact, its averment and proof was necessary. *Cole v. Cole*, 3 Mo. App. 571; *Pate v. Pate*, 6 Mo. App. 50; *Gist v. Loring*, 60 Mo. 487; *Coyle v. Railroad*, 27 Mo. App. 591; *Pier v. Heinrichoffer*, 52 Mo. 333; *Scott v. Robards*, 67 Mo. 289. The case of *Werz v. Werz*, 11 Mo. App. 26, is not in point. (2) No decree for divorce should have been granted in this case. On the whole evidence, the separation seems to have been by mutual consent, no effort at reconciliation seems to have been made by either. And under such circumstances, both parties being in fault, no divorce should have been granted, especially not to plaintiff, as it was clearly her duty to have gone with her husband. He had a home, and was able and willing to take care of her. *Hoffman v. Hoffman*, 43 Mo. 547; *Simpson v. Simpson*, 31 Mo. 24; *Dwyer v. Dwyer*, 16 Mo. App. 432; *Simpkins v. Simpkins*, 22 Mo. App. 26.

Yerby & Vance, for the respondent.

(1) Petition states that plaintiff resided one whole year next before filing her petition in the state of Missouri. (2) The Revised Statutes of Missouri, 1879, provides, page 360, in section 2175, latter part, that the proceedings shall be had in the county where the plaintiff resides, fixing the venue, as it is fixed in practice, section 3481 in other actions, and it is never stated in the petition that defendant resides in the county where suit is brought, or defendant is found in county where plaintiff resides. See *Werz v. Werz*, 11 Mo. App. 26, and authorities there referred to; but if the court should hold that it is a jurisdictional fact that must be averred and proved, then it is cured by eighth clause of section 3582 of the Revised Statutes of 1879, page 612. *Pate v.*

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Pate, 6 Mo. App. 50. The venue is laid in Saline county, Missouri. Petition states they were married in Saline county, Missouri, that she lived with defendant until twenty-sixth of November, 1887; it is in proof that they lived in Marshall, and the court will take judicial notice that Marshall is in Saline county, Missouri. Greenleaf on Evidence [3 Ed.] pp. 63 and 64, secs. 5 and 6; *Bowie v. Kansas City*, 51 Mo. 454; *Woods v. Henry*, 55 Mo. 560; *Hicks v. Ellis*, 65 Mo. 176, particularly on page 183.

GILL, J.—This is an action brought by the plaintiff wife against the defendant husband for a divorce, on the statutory ground that the defendant had absented himself without reasonable cause for the space of one year. Defendant denied the alleged abandonment, and set up by way of cross-action that the plaintiff had without cause deserted the defendant. On the trial had in the circuit court a divorce, with alimony, was decreed plaintiff, and defendant has appealed to this court. These parties were joined in marriage in November, 1886, and separated in October, 1887. When married defendant was a widower with four children residing on his farm some six miles from Marshall, Missouri and plaintiff resided and owned some real estate at Marshall. It seems that during a short time after the marriage, husband and wife lived together at Marshall in the wife's house—then moved to defendant's farm—then back to Marshall in the spring of 1887, where they continued to reside till in the following October, when defendant took his children and returned to the country, the wife remaining at Marshall. Since that time the parties have not lived together as husband and wife.

The facts of this case, as detailed in the evidence, do not warrant the judgment for divorce, rendered by the circuit court. It is quite clear, from a review of the testimony, that the separation in October, 1887, and the continuance thereof, was by common consent of both

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husband and wife. The wife did not get along amicably with the husband's children by a former marriage, and about the date of separation she expressed a desire that husband and children should leave. Thereupon the husband did go with his children to the country. The wife well knew of the preparation by the husband to return to the country, and she silently, and as the proofs show, *cheerfully*, acquiesced. The wife had, on different occasions, declared that she would not again live in the country, on the defendant husband's farm. There were no matters of serious trouble between the two, except that the wife preferred living in town, while the husband chose to reside on his farm in the country. This, with the misunderstanding in relation to the children, appears the only cause for estrangement and separation. There was never, at any time, any effort by either party at conciliation, never any *desire* even expressed that the one or the other should return.

The wife cannot thus make a separation, which was begun and prolonged by her own act and consent, and which she has never made an effort to terminate, a ground of complaint for a divorce from her husband. She is not the "injured party" within the meaning of the law. *Simpson v. Simpson*, 31 Mo. 24; *Dwyer v. Dwyer*, 16 Mo. App. 422. What is here said as to the pretended cause for divorce on the part of the plaintiff applies equally to the defendant's cross-action. His wife was absent by his consent, and he has therefore no legal cause for divorce.

The judgment, therefore, will be reversed and remanded, with instructions to the circuit court to dismiss both the petition and the cross-bill. All concur.

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37 676 47 177 PRUDY ANN GOINS, Respondent, v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY Appellant.

Kansas City Court of Appeals, December 2, 1889

Master and Servant: RULE AS TO INEXPERIENCED SERVANT'S KNOWLEDGE OF DEFECTIVE APPLIANCES AND OF ITS DANGER. Where the master furnished an obviously defective appliance, a servant (a boy) injured in using such appliance (a misshapen link and crooked coupling pin fastened in a draw head) can only recover by showing that his ignorance of the danger incident to its use arose from his youth and inexperience, and the same rule holds in an action for loss of service by the parent of the minor servant.

Appeal from the Mercer Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

Ramey & Brown and *H. J. Allee*, for the appellant.

(1) The brakeman is presumed to understand the use of the apparatus with which he works. In this case he knew its condition and voluntarily, and without complaint or objection, and without disclosing the alleged defect to his employer, continued to use it. In so doing he assumed the risks incident to its use, and cannot recover. *Covey v. Railroad*, 86 Mo. 635; *Hooper v. Railroad*, 21 S. C. 541; *Alexander v. Railroad*, 25 Am. & Eng. Ry. Cases, 458; *Sullivan v. Bridge Co.*, 9 Bush, 81; *Porter v. Railroad*, 71 Mo. 66–77; *Smith v. Railroad*, 69 Mo. 32–41; *Railroad v. Emmert*, 31 Am. & Eng. Ry. Cases, 194. (2) There is no evidence whatever in this case that the injury complained of resulted from the condition of the link and draw head. (3) The first instruction given for plaintiff tells the jury in effect that if the pin and link were fast

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in the draw head, and that they were permitted by defendant to so remain, and that in that condition they were unsafe and Albert Goins was injured by reason thereof, the defendant was liable, provided he did not know the danger of using it in that condition. This was erroneous in telling the jury that it was the duty of the defendant to have the coupling apparatus in an absolutely safe condition. *Tabler v. Railroad*, 93 Mo. 79. Also in telling the jury, as a matter of law, that Albert Goins was under no obligation to understand the use of the apparatus, or to know whether or not it was dangerous to use it in its then condition.

Hyde & Orton, for the respondent.

(1) Contributory negligence, if relied on as a defense, is for the defendant to show, unless it is shown by the evidence produced by the plaintiff. *Lloyd v. Railroad*, 53 Mo. 509; *Petty v. Railroad*, 88 Mo. 306; *Stephens v. Macon*, 83 Mo. 345; *O'Connor v. Railroad*, 64 Mo. 150. (2) All the issues in the first instruction for plaintiff having been found in her favor, she was entitled to a verdict, unless the evidence was such as to conclusively prove that the boy was guilty of contributory negligence. (3) Contributory negligence cannot be imputed to him, unless he knew, not only that the link and pin were fast, but he must have known the risk and danger resulting from that defect. There is a broad distinction between knowing the actual condition of the coupling and knowing the risk or danger resulting therefrom in its use. No evidence was offered by defendant, and none was produced by plaintiff, that he knew the danger he was in, in using this dangerous coupling. The undisputed evidence of Albert was that he did not know this danger, and no facts were shown that would presume his knowledge. *Colbert v. Rankin*, 13 Pacific (Cal.) 491; *Cook v. Railroad*, 24 N. W. (Minn.) 311; *Russell v. Railroad*, 20 N. W. (Minn.) 147; *Smith v.*

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Car Works, 27 N. W. (Mich.) 662; *Parkhurst v. Johnson*, 15 N. W. (Mich.) 107; *Carver v. Christian*, 26 N. W. (Minn.) 8; *Behm v. Armour*, 15 N. W. (Wis.) 806; *Rummell v. Dilworth et al.*, 2 Atlantic R. (Penn.) 85; *McGowen v. Smelting Co.*, 9 Federal Rep.; *Watkins v. Goodall*, 138 Mass. 533; *Looney v. McLean*, 129 Mass. 33; *Reed v. Northfield*, 13 Pick. 94; *Dowling v. Allen*, 74 Mo. 14; *Louisville, etc., Railroad v. Frawley*, 9 N. E. (Ind.) 594, and cases therein cited; *White v. Worsted Works*, 11 N. E. (Mass.) 75; *Dowling v. Allen*, 88 Mo. 293; *Grizzle v. Fost*, 3 Fost. & Finla. 622; *Clark v. Holmes*, 7 N. & H. 937. (4) It was the duty of the defendant not only to furnish reasonably safe appliances, but to exercise a continued supervision over the same to keep them in proper repair. This duty is affirmative, and must be continually fulfilled. *Brann v. Railroad*, 53 Iowa, 495 (36 Am. 343); *Bowen v. Railroad*, 95 Mo. 268; *Tabler v. Railroad*, 95 Mo. 79.

Gill, J.—This action arises out of the same state of facts as in the case of *Albert Goins v. C., R. I. & P. Ry. Co.*, reviewed at the last term of this court. In that case the boy, Albert Goins, by his guardian, sought and recovered damages for injuries received, while in this action Prudy Ann Goins, Albert's mother, seeks to recover for loss of Albert's services by reason of the same injuries. We refer now to the opinion delivered at the last term for a full understanding of the facts giving rise to this suit.

At the hearing of the former case we approved the action of the trial court in giving, among others, the following instructions to the jury, to-wit:

"The jury are instructed that it was the duty of the defendant to use all reasonable care and caution to provide for its employes good and well constructed cars, adapted to the purpose for which they are used, and also to use all reasonable care and watchfulness in keeping said cars and the appliances and parts thereof in

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safe condition. And if the jury find from the evidence that the defendant failed so to do with respect to the pin or link in the draw head of the car which Albert Goins was coupling to the train when he was injured, and that the said link and pin was bent and misshapen so as to be fast in the draw head, and thereby became unsafe to use in coupling said car, and that by reason of the failure of the defendant to use reasonable care and watchfulness with respect to said car, the said link and pin were negligently or carelessly permitted to remain fast in said draw head, and that while in that condition the defendant kept said car in use, and the plaintiff, while using reasonable care in coupling said car, had his hand caught between the draw heads of the cars, and that he received said injury by reason of said defective condition of said link or pin, then the jury will find for plaintiff, *provided the said Albert Goins, by reason of his youth, if he was a youth, and inexperience in such matters, if he was inexperienced, did not know of the danger of coupling said car in its then condition.*"

We have italicized in the foregoing that portion of the instruction then questioned, and we held, following *Dowling v. Allen*, 74 Mo. 13, such qualification of the general doctrine to be proper. But in the case now under review the trial court varied, in one important particular, from the foregoing instruction and saved the plaintiff's right of recovery, "*if said Albert Goins did not know of the danger of coupling said car in its then condition*," eliminating from such provision that such want of knowledge must arise from the *youth and inexperience* of the boy. In other words, the jury, in the case at bar, were told that however patent and visible the defect which occasioned the injury, or however obviously dangerous the use of such appliance might be, yet if Goins did not *know* of such danger, etc., a recovery could be had in a suit against the railroad

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company. This is going beyond the rule stated in *Dowling v. Allen*, and further than we are warranted in the light of reason and authority. If this declaration to the jury is correct then Albert's *want of knowledge* of the danger to which he was exposed might arise from gross inattention, and yet as he did not *know* of the danger, the defendant would be liable. *The want of knowledge*, as held in *Dowling v. Allen*, must arise from the *youth and inexperience* of the injured party. For the error thus appearing in the court's instruction to the jury the judgment must be reversed, and the cause remanded. All concur.

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LUCY A. UPDYKE, Respondent, v. S. E. WHEELER, Appellant.

Kansas City Court of Appeals, February 4, and December 2, 1889.

1. **Sunday Law**: ATTACHMENT. In order to warrant the issuance and service of a writ of attachment on Sunday, under sections 1054 and 4039, Revised Statutes, 1879, the affidavit must state, as in those sections required, that "the debtor is about fraudulently to secrete or remove his effects."

2. **Replevin**: PLAINTIFF MUST SHOW RIGHT IN HIMSELF: POSSESSION. In replevin though it appear defendant has no right to keep the property, yet plaintiff must show property, general or special in himself. Lawful possession is good against a wrongdoer.

3. ———: EVIDENCE: DECLARATIONS OF AGENT. Where a constable with a writ of attachment overtakes M. on the road and levies his writ on the goods in M.'s possession, and plaintiff replevins the goods so attached from the constable, on the theory that M. is her agent, the declarations of M. at the time of the levy by defendant, as to the ownership of the property and where he was taking it, is admissible in evidence, against the plaintiff.

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4. ——: VERDICT. A verdict in replevin, involving the ownership of property consisting of a variety of articles, may be in favor of plaintiff for a part and defendant for the remainder.

5. **Appellate Practice**: ABSTRACT: MOTION FOR NEW TRIAL. When no question is made as to the existence of the motion for a new trial, or its sufficiency, it will not be assumed no such motion existed from the fact that it has not been set out in the abstract.

On motion for rehearing.

Replevin: EVIDENCE: DECLARATIONS OF AGENT: RES GESTÆ. If M. was plaintiff's agent in charge of the property under her instructions, and driving fast to get out of the state as she directed, then his declarations when overtaken as to its ownership and where he was taking it, are part of the *res gestæ*, are the declarations of the plaintiff herself and are admissible; but should be restricted to what M. said and did in reference to the matter in issue at the time he was overtaken.

Appeal from the Jasper Circuit Court.—HON. M. G. McGREGOR, Judge.

REVERSED AND REMANDED.

Samuel E. Wheeler, for the appellant.

(1) The finding of the jury, trying a case in replevin, must be as to the whole of the property replevied; and the verdict, where the property consists of a number of articles, may be in favor of plaintiff as to a part, and in favor of defendant as to a part, according to the rights of the respective parties, as disclosed by the evidence. R. S. 1879, sec. 3673; *Hotchkiss v. Ashley*, 44 Vt. 195; *Elden v. Thompson*, 2 Har. and G. Md. 32; *Powell v. Hinsdale*, 5 Mass. 343; *Clark v. Keith*, 9 Ohio, page 72; *Brown v. Smith*, 1 N. H. 36; *Wright v. Mathews*, 2 Blackf. [Ind.] 187; *O'Keefe v. Kellog*, 15 Ill. 351; *William v. Beede*, 15 N. H. 483; *Pratt v. Tucker*, 67 Ill. 346; *Frost v. Shaw*, 3 Ohio Stat. Rep. 270. (2) And, if the verdict be not according to, and supported by, the evidence, it must be set aside, and a new trial granted, on

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motion for new trial. *Spooner v. Railroad*, 23 Mo. App. 403; *Foley v. Alkire et al.*, 52 Mo. 317. See also *Borgraffe v. Knights*, 22 Mo. App. 127; *O'Donnell v. Railroad*, 7 Mo. App. 90; *St. L. Brewing Co. v. Bodeman*, 12 Mo. App. 373; *Wight v. Railroad*, 20 Mo. App. 431; *Taylor v. Fox*, 16 Mo. App. 527. (3) Declarations of a party in possession of personal property, made in reference to such property, and against the interests of the holder, are admissible in evidence, to establish the ownership thereof. And especially in a case where the declarations are those of an agent, at the time engaged by, and on behalf of, his principal, in fraudulently carrying such property out of the reach of pursuing creditors of his principal, and are offered against said principal's interests, or the interest of any party in privity or collusion with such principal, as to the fraudulent removal of said property. Best Ev. [Am. Ed. 1882] sec. 366; 1 Greenl. Ev. [14 Ed.] sec. 34, p. 46; 1 Greenl. Ev. [14 Ed.] sec. 113, p. 144; 1 Greenl. Ev. [14 Ed.] secs. 108, 109, 111 and 112; Starkie's Ev. [9 Ed.] side p. 89, top p. 87; Starkie's Ev., side page 467, *et seq.*, also pages 64 and 65; *Resch v. Senn*, 28 Wis. 286; *Prideaux v. Mineral Point*, 43 Wis. 513; *Colt v. LaDue*, 54 Mo. 386; *Deyerhart v. Schmidt*, 7 Mo. App. 117; *Kellogg v. Adams*, 51 Wis. 138; 2 Smith's Leading Cases, 183 and notes; *People v. Andrews*, 26 Wis. 317; 3 Greenl. Ev. 93; Waite on Frauds, cen. page 379 (1884); Waite on Frauds, sec. 281, p. 381. (4) An attachment for rent may be had, in this state, on Sunday. R. S. 1879, sec. 3091, p. 517; R. S., sec. 3092, p. 518; R. S., sec. 4039, p. 694. (5) An officer who has taken property, under a regular attachment writ, and seeks to justify and explain his possession under the same, is entitled to put his writ in evidence; and in executing a writ of attachment on Sunday, or any other day, he is not required by the laws of this state to know, or to take cognizance of, nor is he charged with knowledge of, the contents of

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the plaintiff's affidavit and statement in attachment, filed in the court from which the writ issued. *State ex rel. v. Rucker*, 19 Mo. App., p. 587; *Melcher v. Scruggs*, 72 Mo., page 406; Drake on Attachment [6 Ed.] secs. 117, 118, 119, 184 and 184.

Thomas & Hackney, for the respondent.

(1) The testimony of the plaintiff made out a case against the defendant, and, the jury having found in her favor under appropriate instructions, this court will not weigh the evidence. (2) No error was committed in excluding the writ of attachment issued in the case before the justice. The proceedings were commenced on Sunday. The affidavit for attachment did not allege "that the debtor was about fraudulently to secrete or remove his effects." Hence the justice had no jurisdiction to issue a writ on that day. R. S. 1879, sec. 1054; *Allen v. Godfrey*, 44 N. Y. 433. The writ of attachment was for that reason void, and was no protection to the constable. Waples on Attachment, pp. 76, 77, 78, and cases cited; Drake on Attachment [3 Ed.] sec. 84. And a levy of the attachment by him on that day was an act of trespass. R. S. 1879, sec. 4039. (3) The declarations of Moss and Shepard, as to the ownership of the property, were clearly inadmissible against respondent, and the court committed no error in excluding them. *Carroll v. Frank*, 28 Mo. App. 69. The appellant has no standing in this court to allege error in the trial of this cause. If the trial court committed any errors, it should have had an opportunity to correct them by motion for new trial. *State ex rel. v. Hurlstone*, 92 Mo. 329. And such motion must be preserved in the record presented to this court.

Ellison, J.—This is an action of replevin instituted in the circuit court of Jasper county. The defendant's answer was a general denial, and, as a further defense,

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alleged that he was constable of Marion township, in said county, and, as such, he had levied upon and was holding the property, by virtue of a writ of attachment issued by a justice of the peace in said county in the cause of "John B. Cole and Stephen B. Cox, plaintiffs *v.* J. W. Shepard, defendant." The cause for attachment, as stated in the affidavit, was that "the defendant, J. W. Shepard, has disposed of the crop grown by him as tenant of the plaintiffs on the following described land," etc. "And that defendant is about to remove from the state of Missouri with intent to change his domicile."

The writ of attachment was issued and executed on Sunday, and was therefore void, and affords no justification to the officer. Section 1054, Revised Statutes, authorizes the issuance and service of writs on Sunday in cases of attachments "where a debtor is about fraudulently to secrete or remove his effects." But the affidavit should so state, in order to authorize the issuance or service of the writ.

Here, the affidavit is not that the defendant is about to secrete or remove his property, but that he has disposed of it. Section 4039, Revised Statutes, does not relieve defendant; for that section only authorizes the officer to serve a writ of attachment in a like case provided for in section 1054. We have been cited to *State ex rel. Lemon v. Rucker*, 19 Mo. App. 587, but we think it has no application to the case at bar.

II. Notwithstanding defendant has no right or authority to keep possession of the property, it does not follow that plaintiff is necessarily entitled to recover. She must show property, general or special, in herself. It is true that in the absence of other evidence, and as against a trespasser or wrong-doer, a lawful possession will support the action of replevin (*Smith v. Lydick*, 42 Mo. 209); but in this case, plaintiff was not in the possession of the property at all at the time

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of its seizure, unless through her agent, Moss, from whom it was taken. This brings up one of the principal points in the case. Moss, who was in the actual possession of the property, was overtaken by the officer and the plaintiff in the attachment suit, a short time before dark, some four or five miles southwest of Carthage, making his way to the Indian Territory. The evidence tends to show that he left Carthage that late in the evening in order to avoid the attachment which in fact issued, and that the plaintiff in this suit instructed him to drive fast. Under these circumstances defendant offered to prove Moss' declarations as to the ownership of the property and where he was then taking it. The trial court rejected the offer, and such action is assigned for error. There can be no doubt that from plaintiff's theory, whatever relation existed between plaintiff and Moss, as to this property was as principal and agent. Moss had the property in charge for her, indeed this is necessarily her theory of the case. This being true, Moss' declarations, at the time of the seizure of the property, should have been received in evidence as the declarations of an agent. 1 Greenleaf Ev., sec. 113.

III. The verdict of the jury included the entire property replevined. Plaintiff, as a witness at the trial, disclaimed ownership to a portion of it, and it was therefore error in the court to sustain a verdict for that portion. *Spooner v. Railroad*, 23 Mo. App. 403. A verdict in replevin, involving the ownership of property consisting of a variety of articles, may be in favor of plaintiff for a part and defendant for the remainder; or, as it has been sometimes expressed, may be in favor of both parties. Wells on Replevin, sec. 744.

IV. It is next contended that, as appellant has not set out in his abstract the motion for new trial, we should treat the case as though none had been filed. I do not think this is a correct interpretation of rule 15. That rule only requires the abstract to set forth so much

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of the record as is necessary to a full understanding of all the questions presented for decision. There is no question presented here as to there being a motion for new trial, or that it did, or did not, cover certain objections. When no question is made as to the motion or its sufficiency, we will not assume that no such motion existed from the fact that it has not been set out in the abstract.

With the concurrence of the judges, the judgment is reversed, and the cause is remanded.

ON MOTION FOR REHEARING.

If Moss was plaintiff's agent, he being in charge of the property as such agent, under instructions from her and attempting to get it out of the state, she telling him to drive fast, his declarations when overtaken as to the ownership of the property, and where he was then taking it, are apart of the *res gestæ* and are admissible. They are, in effect, the declarations of plaintiff herself. They do not relate to past transactions but to what was then depending.

Greenleaf in section 113, volume 1, of his work on evidence says, that wherever what the agent did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it. The cases cited from this state of *Ladd v. Couzins*, 35 Mo. 516; *Adams v. Railroad*, 74 Mo. 556; *Bevis v. Railroad*, 26 Mo. App. 21, sustain, instead of controvert, what was stated in the opinion.

Questions concerning Moss' declaration should be restricted to what he said and did in reference to the matter at issue, at the time he was overtaken.

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BY DAVID GOLDSMITH.

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DAMAGES.

1. BREACH OF CONTRACT.—The measure of the damages for the breach of a contract for the delivery of the future products of an orchard is the value of such products, when fit for delivery. *Smock v. Smock*, 56.

2. BREACH OF WARRANTY.—When a tank, which is built to order and is not as warranted, bursts, and the bursting of it results not from defects covered by the warranty, but from careless handling of it by the vendee, the damages thus occasioned cannot be recovered from the warrantor. *Callahan v. Morse*, 189.

3. DAMAGES FOR WRONGFUL DISCHARGE. — When a servant is wrongfully discharged by his master, he is bound only to seek employment similar to that contracted for with such master, and his damages will not be lessened for the failure to accept other service, unless such other service was for such similar employment. But wages actually earned by the servant during the unexpired part of the contract term, though not for similar employment, may be shown in mitigation of damages for the wrongful discharge. *Stevens v. Crane*, 487.

4. ———. The servant being employed to perform such duties as might be required of him for the management of an estate, all his time could be required, if necessary for the performance of his duties; and in such case the jury should not be directed to allow in mitigation of damages for wrongful discharge only the wages earned within such time as would have been required for the performance of said duties. *Stevens v. Crane*, 487.

5. NON-DELIVERY OF TELEGRAM IN CIPHER.—When a telegraphic message is sent in cipher, and the telegraph company is not apprised of its meaning, only nominal damages can be recovered for mere delay in delivery by the company, not equivalent to non-delivery, and in case of non-delivery, or delay in delivery substantially amounting to non-delivery, the cost of the message with interest constitutes the measure of damages. *Abeles v. Western U. Tel. Co.*, 554.

6. FOR WRONGFUL TAKING OF PROPERTY.—In an action for the wrongful taking from and not returning to plaintiff of certain school books, the measure of damages is the value of the property at the time it was seized; and if, after such seizure, the books were returned, then the measure of damages was the difference in their value at the time of the seizure and at the time of the return. *Green v. Stephens*, 641.

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7. MITIGATION OF—SEIZURE UNDER LEGAL PROCESS.—In an action for wrongful taking of goods, the fact that defendant as constable attempted to attach such goods, but plaintiff while in possession recovered judgment for possession, constitutes no defense but is only matter in mitigation of damages. *Green v. Stephens*, 641.

DEFINITIONS.

1. PARTY IN INTEREST.—The meaning of "party in interest to the proceedings," as used in the assignment act, is discussed in the opinion. *State ex rel Millett v. Field*, 83.

2. "FRUCTUS INDUSTRIALES." *Smock v. Smock*, 56.

3. "GIVE." *Smock v. Smock*, 56.

4. "OWNER" IN U. S. INTERNAL REVENUE LAWS. *Conrad v. Fisher*, 852.

DIVORCE. See MARRIAGE AND DIVORCE.

DOWER.

WIDOW'S QUARANTINE—PAROL LEASE.—Where a decedent makes a parol contract to rent his homestead for a part of the crop, and dies before the lessee in fact enters into the possession, and commences to work under the contract, and his administrator receives such part of said crop and converts the same, the widow is entitled to recover the whole proceeds from the administrator. *Tincher v. Phillips*, 621.

DRAMSHOPS.

1. ACTION, TAXPAYERS' RIGHT OF.—After refusal by the attorney general of the state and of the prosecuting attorney of the county to act, a writ of *certiorari* may be granted upon application of assessed taxpaying citizens of the township to revise the illegal action of the county court in granting a license to keep a dramshop in such township. *State ex rel. v. Heege*, 338.

2. DOWNING LAW, ACTION OF COUNTY COURT UNDER.—The county court in issuing such dramshop license acts judicially, and not ministerially. *State ex rel. v. Heege*, 338.

3. ———. An application in writing for a license, signed by taxpayers and verified by the applicant, and stating the place where the dramshop is to be kept, although not in form, the petition of the applicant is a substantial compliance with the requirement of Revised Statutes, section 5488, as amended by the Downing law (act of March 24, 1883). *State ex rel. v. Heege*, 338.

4. DOWNING LAW, JURISDICTION OF COUNTY COURTS UNDER.—The jurisdiction of the county court in granting a license must appear on the face of its proceedings. *State ex rel. v. Heege*, 338.

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5. ———. It is therefore essential that the petition should show that it is signed by the requisite majority of *assessed* taxpaying *citizens;* a petition which merely purports to be signed by a majority of taxpayers of the township is insufficient. *State ex rel. v. Heege*, 338.

6. ———. The requirement that the petition should be laid before the county court at the first term after the filing of it in the office of the clerk is mandatory. *State ex rel. v. Heege*, 338.

7. ———. The county court may amend, revise or revoke its order, granting a license during the term in which the order was made. *State ex rel. v. Heege*, 338.

ELECTION OF REMEDIES.

IN CASE OF WRONGFUL LEVY, see *Hawk v. Applegate*, 32.

ESTOPPEL. See EXECUTION, 1.

FOR STATEMENT OF PRINCIPLES OF ESTOPPEL, see Pledge, 6.

EVIDENCE.

1. RULE AS TO ADMISSIBILITY OF DECLARATIONS OF AGENT.—The declarations of an agent are admissible in evidence against his principal when a part of the transaction he is engaged in for his principal at the time, and the declarations of an agent admitted in this case are examined and *held* to fall within the rule. *Hawk v. Applegate*, 32.

2. DECLARATIONS OF AGENT.—Where a constable with a writ of attachment overtakes M. on the road and levies his writ on the goods in M.'s possession, and plaintiff replevins the goods so attached from the constable on the theory that M. is her agent, the declaration of M. at the time of the levy by defendant, as to the ownership of the property and whither he was taking it, is admissible in evidence against the plaintiff. *Updyke v. Wheeler*, 679.

3. DECLARATIONS OF AGENT—RES GESTÆ.—If M. was plaintiff's agent in charge of the property under her instructions, and driving fast to get out of the state as she directed, then his declarations when overtaken as to its ownership and whither he was taking it, are part of the *res gestæ*, are the declarations of the plaintiff herself and are admissible; but should be restricted to what M. said and did in reference to the matter in issue at the time he was overtaken. *Updyke v. Wheeler*, 679.

4. AGENCY, EVIDENCE OF.—The declaration of an alleged agent is not admissible against a party without proof of the agency, and such agency cannot be established by the declaration itself. And this rule applies to a declaration made by a police captain to the plaintiff, on the arrest of the latter, that the arrest had been made by the defendant. *Diel v. Mo. Pac. Ry. Co.*, 454.

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5. DECLARATIONS OF TESTATOR.—In an action contesting the validity of a will, declarations of the testator before and after the making of the will are competent evidence on the question of his testamentary capacity, but not on an issue as to the use of undue influence in procuring the execution of the will. *Jones v. Roberts*, 168.

6. ACCORD AND SATISFACTION.—To sustain a plea of accord and satisfaction, there must be evidence of the acceptance, as a satisfaction of the matter relied upon as an accord; and a written transfer of a policy of insurance purporting to be for the benefit, *pro rata*, of specified creditors, if only accompanied by the debtor's testimony that he understood that it was to be a satisfaction of the claims of such creditors, does not constitute such evidence. *Wilkerson v. Bruce*, 156.

7. ADMISSIONS.—An admission is not conclusive when there is no element of estoppel in the case. *Newcomb v. Jones*, 475.

8. ASSIGNMENT OF SPECIAL TAX BILL BY CORPORATE OFFICER.—Such assignment, when made by a corporation, is sufficiently established by proof of an assignment in writing, signed by the president of the corporation; evidence of the president's authority to make the assignment is not requisite. *Bambrick v. Campbell*, 460.

9. BOOKS OF ACCOUNT.—Books of account of a party are not admissible in evidence in his favor, although supported by the suppletory oath of himself, or of the clerk who made the entries. *Anchor Milling Co. v. Walsh*, 567.

10. REFRESHING MEMORY OF WITNESS.—Such books may be used as memoranda to refresh the memory of a witness, but the witness must, after his memory has been thus refreshed, testify from recollection independent of the entries. *Anchor Milling v. Walsh*, 567.

11. BOOKS PRODUCED AT INSTANCE OF OPPOSITE PARTY.—Where a party produces books or papers in court at the instance of the opposite party, he may put them in evidence, although he would not otherwise have been entitled to do so. *Anchor Milling Co. v. Walsh*, 567.

12. FOREIGN JUDGMENT.—The rejection of evidence of judicial proceedings of a foreign tribunal, which are pleaded as a judgment, but which do not constitute a judgment under our practice, is not erroneous in the absence of proof, or tender of proof, of the laws of the foreign forum. *Sherwood v. Miller*, 48.

13. WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESS.—The jury in determining the weight of evidence, and settling the conflicts of testimony, are not confined alone to the mere credibility of the witnesses, but should consider the evidence in the light of all the circumstances, and of reason aided by experience and the ordinary transaction of men. *Layson v. Wilson*, 686.

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14. ——— PAROL AGREEMENT—VARYING WRITING.—A contemporaneous parol agreement is not admissible to vary or alter the terms of a note absolute on its face and complete in its terms, and such agreement can constitute no defense. *Reed v. Nicholson*, 646.

15. SALE AS EVIDENCE OF VALUE.—In an action for breach of warranty of an article or thing sold, the price agreed to be paid is evidence of the value of such article or thing in the condition warranted. *Layson v. Wilson*, 636.

16. BURDEN OF PROOF. See Wills, 1.

17. ADMISSIONS BY ONE OF SEVERAL DEFENDANTS. See Practice, Trial, 5.

EXCEPTIONS, BILL OF. See PRACTICE, TRIAL, 9; MANDAMUS, 8.

EXECUTION.

PURCHASE PRICE—ESTOPPEL.—While personal property is subject to execution for the price thereof except in the hands of an innocent purchaser for value, without notice of such prior claim, yet the position of one who has notice of such prior claim, and who, desiring to buy, is informed by the execution creditor that he would look to the original purchaser and not to the property for the purchase money, and upon the faith of such assurance buys and pays for the property, is not different from that of an innocent purchaser for value without notice, and the estoppel raised by the pleading and evidence in this case was properly submitted to the jury. *Hawk v. Applegate*, 82.

EXPRESS COMPANIES. See COMMON CARRIERS.

FACTOR AND BROKER. See PRINCIPAL AND AGENT, 1, 2.

FOREIGN LAW. See PRESUMPTIONS, 4.

FRAUDS, STATUTE OF.

1. CONTRACT FOR FRUIT CROP.—A contract for peaches, apples and blackberries, to be produced or raised on certain lands, is not a contract for the sale of an interest in land. *Smock v. Smock*, 56.

2. CONTRACT FULLY PERFORMED BY ONE PARTY.—A contract, which is not to be performed within a year, is, notwithstanding the statute of frauds, enforceable by a party to it, who has completely performed it on his part. *Smock v. Smock*, 56.

FRAUDULENT CONVEYANCES. See CHATTEL MORTGAGES, 2, 3; CORPORATIONS, 1.

GARNISHMENT.

OF DEBT DUE TO PARTNERSHIP.—A debt due to a partnership cannot be reached by garnishment on a writ of execution against one of its members. *Pullis v. Fox*, 592.

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HABEAS CORPUS. See CONTEMPT, 1, 5.

1. CUSTODY OF CHILD.—The custody of a child should not be changed on *habeas corpus*, during the pendency before another tribunal of a divorce suit, which involves the question of such custody, unless it clearly appears that the child will sustain serious prejudice in its health or morals by remaining, even during the pendency of that suit, in the custody in which it is. *In re Delano*, 185.

2. ———. In a proceeding on *habeas corpus* the interest of the child is the paramount consideration, and, within the years of nurture, the custody of the mother is presumptively better for the child than that of the father. *In re Delano*, 185.

HUSBAND AND WIFE. See MARRIAGE AND DIVORCE.

1. WIFE'S RIGHTS OF ACTION.—In the case of the breach of a contract made with a married woman, owing to which she is prevented from earning money, the right of action vests in the husband alone, and this rule is not affected by Revised Statutes, 1879, section 3296, as amended in 1883. *Lavelle v. Stifel*, 525.

2. ———. The wife has no right of action for such breach, even if, subsequent to the breach of the contract, she procures a divorce from her husband. *Lavelle v. Stifel*, 525.

INJUNCTION.

1. TAXPAYER'S RIGHT OF.—Injunction lies on suit of a taxpayer to restrain an illegal diversion of public funds which municipal officers in charge of the funds are about to make; nor does the solvency of the officers affect this right. *Black v. Ross*, 250.

2. INJUNCTION FOR PIRACY OF CORPORATE NAME.—When a person or business corporation assumes a firm name or corporate name which so closely resembles that of a business rival that the business of the latter is liable to be diverted, and the public deceived on account of it, the use of such name will be restrained by a court of equity. *Plant Seed Co. v. Michel P. & S. Co.*, 313.

3. ———. But to warrant such relief, the facts warranting such relief must be established by very satisfactory proof. *Plant Seed Co. v. Michel P. & S. Co.*, 313.

4. ———. When the conduct complained of is that merely of a fair competitor in the same line of business, and the name assumed is not likely to mislead ordinary purchasers, a court of equity will not interfere. *Plant Seed Co. v. Michel P. & S. Co.*, 313.

5. ———. And since the statute requires every business corporation to select a business name indicative of its business, too stringent rules are inadvisable in such controversies, and, when a case is free from actual fraud, the fact, that some confusion and friction in business results from the similarity of names, will not warrant interference. *Plant Seed Co. v. Michel P. & S. Co.*, 313.

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INSTRUCTIONS.

1. Not warranted by the evidence.—An instruction given by the trial court to the jury is erroneous, if not warranted by the evidence. *Dearing v. Fletcher*, 122; *Jones v. Berry*, 125; *Newcomb v. Jones*, 475.

2. Misleading instructions.—An instruction that a defendant is required to establish a matter, as to which the burden of proof rests upon him, by competent evidence, is misleading and erroneous; it is the province of the court to declare what evidence is competent. *Jones v. Roberts*, 168.

3. Instructions taken together, not misleading.—Although the instructions given for one party may be subject to criticism, yet, if all the instructions, taken together as a whole, present the case to the jury in an intelligible manner and are not misleading in character, the judgment should not be disturbed. *Railroad v. Schoennen*, 612.

4. Common error.—An appellant cannot complain that instructions given for the respondent were not warranted by the evidence, when the instructions given at his own request submit to the jury the same issues as those complained of. *Straat v. Hayward*, 585; *Railroad v. Schoennen*, 612.

5. Refusal, when non-prejudicial.—The refusal of instructions asked by the appellant is not prejudicial error, when the instructions given by the court fairly presented the law of the case to the jury. *Straat v. Hayward*, 585.

6. Refusal, when not error.—Error is not assignable of the refusal of an instruction asked by the appellant, if such instruction is contradictory of and inconsistent with other instructions given at the request of the appellant. *Straat v. Hayward*, 585.

7. Containing term "preponderance of evidence."—Although it is not error to refuse an instruction stating that a party having the burden of proof must satisfy the jury "by a preponderance of evidence," the unexplained use of this expression in an instruction is not ordinarily prejudicial error. *Anchor Milling Co. v. Walsh*, 567.

8. Defining "undue influence" in action contesting validity of a will.—An instruction, that "by undue influence is meant the substitution of the intention of another for that of the testator," is too general, and therefore erroneous. *Jones v. Roberts*, 168.

9. Defining ground for discharge of servant.—An instruction which leaves it to the jury to say what constitutes good and sufficient cause of discharge is defective. *Stevens v. Crane*, 487.

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10. DAMAGES—BREACH OF WARRANTY.—In an action for the breach of warranty of a jack, the measure of damages is the difference between his value as warranted at the time and place of sale and his value as he was, and where an instruction taken in connection with the evidence clearly indicates that the value should be fixed at such time and place, it is sufficient, though it may not use the words, "value at the time and place of sale." *Layson v. Wilson*, 636.

INSURANCE, FIRE.

1. PROOFS OF LOSS.—Compliance with a condition in a policy of fire insurance requiring proofs of loss is a condition precedent to a recovery under the policy, unless a waiver of it has been shown. *Leigh & Springfield F. & M. Ins. Co.*, 542.

2. ———. The fact that the policy requires a certificate of the nearest justice of the peace as a part of the proofs, and that the nearest justice refuses to give the requisite certificate, does not dispense with the necessity for proofs of loss; but, *semble*, the capricious refusal of the justice to give the certificate would not prevent a recovery, if the requirement for proofs were otherwise complied with, and the certificate of another justice obtained. *Leigh v. Springfield F. & M. Ins. Co.*, 542.

3. WAIVER OF PROOFS.—A waiver is not established by proof that immediately after the fire, and after the company had knowledge of it, the adjuster of the company visited the scene of loss and saw the assured, nor by the fact that, after the expiration of the time for the delivery of the proofs and after the institution of suit on the policy, the company made an offer of compromise to the assured. *Leigh v. Springfield F. & M. Ins. Co.*, 542.

INTERNAL REVENUE OF UNITED STATES.

DISTILLED SPIRITS—DELIVERY TO THE "OWNER," WHEN TAX IS PAID. In the provisions of the revenue laws of the United States which require the delivery of distilled spirits by the government warehouseman to the *owner* when the tax is paid, congress merely intended, by the use of a general word of description, to designate, without circumlocution or needless specification, any person who, upon the payment of the government dues, is in law entitled to the possession of the goods.

JUDGMENT. See APPEAL, 1.

1. A decree written out and spread upon the record after the adjournment of the court, and taxing costs against two of the defendants, when the entry on the docket of the judge authorized a general judgment against all the defendants, cannot be questioned on that ground in a collateral proceeding. *Black v. Ross*, 250.

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2. NOT SUSPENDED BY MOTION FOR A NEW TRIAL.—An order of the court removing the assignee could not be suspended by the filing and pendency of a motion for a new trial, and could only be suspended by a bond and an affidavit in appeal entitling the assignee to a *supersedeas*. *State ex rel. v. Field*, 83.

3. COLLUSIVE JUDGMENT.—For remedy in case of collusive allowance against estate of decedent in course of administration, see *Garr v. Harding*, 24.

4. EFFORTS TO APPEAL.—Mere efforts to appeal do not suspend judgment. *Ex parte Millett*, 76.

5. FOREIGN JUDGMENT—WHEN NOT ADMISSIBLE IN EVIDENCE WITHOUT PROOF OF LAW OF FORUM. *Sherwood v. Miller*, 48.

JURISDICTION.

1. JURISDICTION OF THIS COURT.—While this court has the right to determine constitutional questions in cases in which it has original jurisdiction, the exercise of this right is inadvisable. (*Ex parte Boenninghausen*, 21 Mo. App. 267, *affirmed*.) *Ex parte Olden*, 116.

2. ———. In proceedings in *mandamus*, this court has original jurisdiction, concurrent with supreme court, bounded only by its territorial limits, and unlimited as to the values or the questions that it may involve, and its judgments therein are of like force and effect. *State ex rel. Millett v. Field*, 88.

3. ———. A constitutional question is involved, when it fairly arises on the record of a cause, and is not a mere sham. *Ex parte Olden*, 116.

4. ———. When a cause is transferred by the supreme court to one of the courts of appeals, the order of transfer must be treated as an adjudication that the court of appeals has exclusive jurisdiction of the appeal. *Syenite Granite Co. v. Bobb*, 488.

5. OF COURT OF APPEALS AS TO ALIMONY PENDENTE LITE.—While this court cannot by an independent order enlarge or limit an allowance for alimony *pendente lite*, made by the circuit court, it may, in making a final decree of its own, granting a divorce to the husband, direct the payment of alimony as a condition to the entry of the decree. *Dawson v. Dawson*, 207.

6. OF COUNTY COURTS—IN GRANTING DRAMSHOP LICENSE. See Dramshops, 2-7.

JUSTICE OF THE PEACE.

1. JUSTICES' COURTS—CHANGE OF VENUE—TRANSCRIPT—DOCKET.—On change of venue in a justice's court it should appear by the transcript of the justice before whom the cause originated, if not also in the docket of the justice to whom the case is sent, that there was a change of venue, and the original papers should be sent with the transcript. *Barr v. Blomberg*, 605.

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2. ——— ORIGINAL ACCOUNT—DISMISSAL.—Where on appeal to the circuit court from the judgment of Justice L. the account sued on does not appear among the papers, it is error to permit the filing of an account shown to have been filed before Justice B. when there is nothing in the record showing any connection between Justice B. and Justice L., and defendant's motion to dismiss should have been sustained. *Barr v. Blomberg*, 605.

3. ATTACHMENT.—For practice in suits by attachment, see Attachment, 2, 3.

4. MECHANICS' LIENS—PRACTICE BEFORE JUSTICES. See Mechanics' Liens, 1, 2.

LANDLORD AND TENANT.

1. LEASE—CONSTRUCTION OF.—The reservation in a recorded lease of a lien on personalty on the property leased is equivalent to a mortgage, covering, as between the parties to it, everything intended, and, as to third persons, everything within its terms. *Attaway v. Hoskinson*, 182.

2. ———. Such a reservation of a lien on the "furnishing" in a hotel is not, in the absence of evidence giving to this term some established meaning, effective as to third persons, because, without the aid of such evidence, the term is too indefinite to cover any specific property. *Attaway v. Hoskinson*, 182.

3. ———. Under a lease requiring the tenant to repair all damage done to the premises during his occupancy, "the usual wear and tear and providential destruction by fire excepted," and providing that rent should cease "in the event of the destruction of said premises by fire," a destruction which does not permanently unfit the premises for occupation does not release the tenant from the payment of rent. *Spalding v. Munford*, 281.

LEASE. See LANDLORD AND TENANT.

LAW AND FACT.

VENDOR'S LIEN—WHEN A QUESTION OF FACT.—Where the facts are numerous and equivocal,—susceptible of different inferences in respect of the question what was the real intent of the parties,—the question whether there has been such a delivery as divests the vendor's lien is a question of fact for a jury. *Conrad v. Fisher*, 352.

LIBEL AND SLANDER. See PLEADING, 3.

The sending of a libellous writing to the person libeled is a publication of the libel. *Houston v. Woolley*, 15.

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LIMITATIONS, STATUTE OF.

1. PARTIAL PAYMENT—PRIMA FACIE CASE.—The holder of a note makes a *prima facie* case against the statute of limitations by merely showing a part payment; and if such payment is made without intending it should operate as an acknowledgment as to the residue, such lack of intent must be evidenced by some act of the payor, and should be made to appear by him. *Bender v. Markle*, 234.

2. PAYMENT—BY WHOM MADE—AGENCY OF MORTGAGEE.—Such payment is sufficient to prevent the running of the statute, if made by any one authorized to make it, and every mortgagee may be said to have an order from the mortgagor, either in express terms or by operation of law, that the proceeds of the sale of the land shall be applied as a payment on the note. *Bender v. Markle*, 234.

3. REASONABLENESS OF TIME OF SALE.—As to whether the question of the reasonableness of the time of the sale of the land by plaintiff might be a proper subject of inquiry, *quaere*. *Bender v. Markle*, 234.

4. PAYMENT—CREDIT ON NOTE OF PROCEEDS OF IRREGULAR SALE UNDER MORTGAGE.—Where the holder of a conveyance intended as a mortgage sells the property without foreclosure proceedings and credits the proceeds on the note intended to be secured by such conveyance, such credit will operate as a payment made by defendant so as to prevent the bar of the statute of limitations, though the defendant may not be bound by the amount of the sale and will be entitled to a credit equal to the value of the land so irregularly sold. *Bender v. Markle*, 234.

5. PARTNERSHIP.—It does not follow that the dissolution of a partnership sets the statute of limitation in motion, but as long as there are debts to be paid or credits to be collected, the statute of limitations does not begin to run, as to the account between the partnership and any of its members, and the agency or trusteeship of the several partners would continue so as to prevent the statute from running till it was shown to have been renounced on the one side or not recognized upon the other. *Bender v. Markle*, 234.

MALICIOUS PROSECUTION.

EVIDENCE OF.—To warrant the submission to the jury of an action for malicious prosecution, there must be some evidence, that the defendant was a party to the prosecution complained of. *Diel v. Railroad*, 454.

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MANDAMUS.

1. TO REQUIRE JUDGE TO TAKE BOND.—*Mandamus* will lie against a circuit judge to require him to take bond from one, who was appointed clerk of his court on the resignation of the incumbent of the office and commissioned as such by the governor of the state, and this is so notwithstanding, that the clerk who resigned was suspended from office by the judge, and that the judge had appointed a temporary clerk prior to the appointment by the governor, and that the validity of the appointment by the governor was contested on this ground. *State ex rel. v. Wear*, 825.

2. ———. *Mandamus* lies in such case not for the determination of the validity of the governor's appointment, and the right of the appointee to the office, but for the purpose of enabling the appointee to qualify, and then enforce his title, if denied. *State ex rel. v. Wear*, 825.

3. REMEDY AS TO ACTION ON BILL OF EXCEPTIONS.—Where a bill of exceptions is presented to the trial judge for his signature, it is his duty to act,—allow or disallow,—and he cannot be permitted to sacrifice the right of litigants by his inaction; and *mandamus* is the proper remedy to compel him to act. *State ex rel. Millett v. Field*, 83.

4. PEREMPTORY WRIT MUST FOLLOW ALTERNATIVE.—The peremptory writ of *mandamus* must conform strictly with the terms of the alternative writ; and if more is demanded in the alternative writ than can be granted in the peremptory writ, then the peremptory writ must be denied altogether. *State ex rel. v. Field*, 83.

5. CAN ONLY MOVE TO ACTION, CANNOT CONTROL DISCRETION. It is not the province of *mandamus* in dealing with subordinate tribunals to command any particular judgment, or to require the exercise of a discretion, reposed by law in such court, in a particular case. The superior court may command the lower court to move; and the penalty of an appeal bond, and the sufficiency of the securities thereon, are matters left to the judgment of the court where the same is to be filed, and it is not in the power of this court to exercise such judgment and discretion for, or on behalf of, such court. *State ex rel. Millett v. Field*, 83.

MARRIAGE AND DIVORCE.

1. VALIDITY OF MARRIAGE.—If a married woman remarry during the lifetime of her husband, her second marriage is void, although contracted in the belief that her husband is dead, and although the facts were sufficient to warrant a legal presumption of his death. The first marriage could only be annulled by the actual death of one of the contracting parties, or a decree of divorce. *Pain v. Pain*, 110.

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2. ——. The invalidity of a second marriage under such circumstances cannot be "condoned;" the doctrine of condonation has no application. The second marriage will remain a nullity though the second husband continue to live with the married woman knowing at the time that the first husband is alive. *Pain v. Pain*, 110.

3. CONDONATION.—The knowledge of an offense, which is requisite to a condonation of the offense, must be based on credible information; knowledge of a rumor of the commission of the offense will not suffice. *Pain v. Pain*, 110.

4. GROUND FOR.—Acts of cruelty need not be sufficient to endanger life in order to be ground for divorce as indignities rendering the plaintiff's condition intolerable. *McCartin v. McCartin*, 471.

5. ALIMONY.—When awarded in gross and for the support solely of the wife, alimony should not ordinarily exceed one-half of the entire estate of the husband. *McCartin v. McCartin*, 471.

6. ALIMONY, PENDENTE LITE.—Alimony *pendente lite*, in so far as it is granted to defray counsel fees and costs of suit, ceases at once upon the final ascertainment of the wife's guilt; but such alimony, in so far as it is allowed for the support and maintenance of the wife, unless vacated or modified, continues until the actual dissolution, by a final decree of divorce, of the bonds of matrimony. *Dawson v. Dawson*, 207.

7. SEPARATION BY COMMON CONSENT, NO GROUND FOR DIVORCE. Neither husband nor wife can make a separation, which was begun and prolonged by their common act and consent, and which neither has ever made an effort to terminate, a ground of complaint for divorce from the other. *Gilmer v. Gilmer*, 671.

8. CUSTODY OF CHILD.—For rules on this subject, see Habeas Corpus, 1, 2.

9. ALIMONY—JURISDICTION OF THIS COURT TO REQUIRE PAYMENT OF ALIMONY PENDENTE LITE. *Dawson v. Dawson*, 207.

MARRIED WOMEN.

ATTACHMENT.—This process does not lie in an action to charge the separate estate of married women. *Brumback v. Weinstein*, 520.

MASTER AND SERVANT. See NEGLIGENCE, 1, 2, 3 and 4.

1. GROUND FOR DISCHARGE OF SERVANT.—Mere annoyance to the master, owing to the servant's conduct, is no ground for the discharge of the servant. *Stevens v. Crane*, 487.

2. DAMAGES FOR WRONGFUL DISCHARGE. See Damages 3, 4.

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MECHANICS' LIENS.

1. Practice before justice of the peace.—In an action, under article 4, chapter 44, Revised Statutes, 1879, for the enforcement of a mechanic's lien, before a justice of the peace, the filing of a statement of the plaintiff's cause of action is essential to the jurisdiction of the justice, and the record must affirmatively show the filing thereof. *Sanderson v. Fleming*, 595.

2. The lien papers must show that the indebtedness accrued within the time prescribed by the statute for the filing of the lien. *Sanderson v. Fleming*, 595.

3. Construction of statute—priority of lien—mortgage.—Under sections 3172, 3173 and 3174, Revised Statutes, 1879, where improvements and repairs are made upon buildings on the land when a prior mortgage was executed, the lien for such repairs and improvements is subject to such prior mortgage, but if the building, erection or improvement is an independent affair, not in existence when the mortgage was taken, it will be subject to the "mechanic's lien" in preference to such prior mortgage and may be sold and removed. *Dugan v. Scott*, 662.

4. Suit to enforce—adjustment of liens.—A suit to enforce a mechanic's lien is not the proper proceeding, as upon a bill in equity, to adjust the priority of liens; yet, when the question of priority necessarily comes up, as an incident of the case, the court *ex necessitate rei* passes upon it. *Dugan v. Scott*, 662.

MORTGAGES. See Chattel Mortgages; Pleading, 4.

1. Mortgage or conditional sale—intention—maxim—doubt.—Whether a conveyance absolute on its face is a mortgage or a conditional sale is to be ascertained by learning the intention of the parties, and is fixed at its inception and is not changed by lapse of time, the maxim, "once a mortgage always a mortgage," applying; and, in case of doubt, such doubt should be resolved in favor of the instrument being intended as a mortgage. *Bender v. Markle*, 234.

2. Statute of limitation—effect of application of proceeds of sale under mortgage or note. See Limitation, 1, 2, 3 and 4.

MUNICIPAL CORPORATIONS.

1. Construction of ordinances—effect of usage in construction of ordinances. See Custom, 1, 2 and 3.

2. Validity of ordinances for public work. See Special Taxes, 5, 6, 7 and 8.

NEGLIGENCE.

1. Law regarding obligation of master to furnish proper machinery and keep it in repair stated in *Goins v. Railroad*, 221.

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2. Mere knowledge of the defects of dangerous machinery is not a bar to the recovery, if the servant, owing to his inexperience and youth, be ignorant of the risks he takes, and has not been apprised of the danger by his master. *Goins v. Railroad*, 221.

3. And when the master changes the nature of the servant's employment from that of shoveler on a gravel train to that of brakeman, and the servant's lack of skill and information regarding his latter employment is known to the master, the lack of ordinary skill on the part of the servant is no defense. *Goins v. Railroad*, 221.

4. RULE AS TO INEXPERIENCED SERVANT'S KNOWLEDGE OF DEFECTIVE APPLIANCES.—Where the master furnished an obviously defective appliance, a servant (a boy) injured in using such appliance (a misshapen link and crooked coupling pin fastened in a draw head) can only recover by showing that his ignorance of the danger incident to its use arose from his youth and inexperience, and the same rule holds in an action for loss of service by the parent of the minor servant. *Goins v. Railroad*, 675.

5. CONTRIBUTORY NEGLIGENCE.—Contributory negligence is an affirmative defense, and a plaintiff cannot be debarred from recovery on that ground, unless the evidence adduced by him raises an unavoidable inference of negligence on his part. *Florida v. Pullman Pal. Car Co.*, 598.

NEW TRIAL. See PRACTICE, TRIAL, 9.

NOTICE. See CORPORATIONS, 2.

PARTIES.

That, in case of assignment of a special tax bill, suit may be brought in the name of the assignee, see *Bambrick v. Campbell*, 460.

PARTNERSHIP.

1. ACTION BETWEEN PARTNERS AFTER DISSOLUTION—EQUITABLE, WHEN. Notwithstanding there may be a settlement between partners of matters theretofore existing and a dissolution, the partnership still continues in a qualified sense, for the purpose of paying and collecting partnership claims, and adjusting partnership affairs and partnership relations which existed or had their inception prior to the dissolution; and an action by one partner against another for a sum alleged to be due plaintiff on account of partnership matters transpiring since the dissolution is an action of equitable cognizance, and this, too, though there is no prayer for an accounting, as the relief will be granted in accordance with the facts averred and proved. *Bender v. Markle*, 234.

2. GARNISHMENT.—A debt due to a firm cannot be reached by garnishment on process against one of its members. *Pullis v. Fox*, 592.

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PHYSICIANS.

RIGHT TO RECOVER COMPENSATION.—The statutes restricting the right to practice medicine and surgery to registered physicians and surgeons, and requiring the filing of diplomas, apply to one who as a physician gives electric treatments; it is not necessary that one should administer internal remedies in order to practice medicine within the meaning of these statutes. *Davidson v. Bohlman*, 576.

PLANK ROAD COMPANIES. See CORPORATIONS, 4.

PLEADING.

1. ACCORD AND SATISFACTION.—A plea of accord and satisfaction, which fails to state that the matter relied upon as an accord was accepted as a satisfaction by the creditor suing, is bad on demurrer, but good after a verdict sustaining it. *Wilkerson v. Bruce*, 156.

2. INVALIDITY OF CONTRACT.—When a petition states a contract valid on its face, and extrinsic matter not appearing from the petition is relied upon as invalidating the contract, such matter must be pleaded in order to bring the validity of the contract into question. *St. Louis, etc., Ass'n v. Delano*, 284.

3. LIBEL.—It is a sufficient statement of a libel to set forth *verbatim* a letter, which imputes to the plaintiff an indictable offense for which corporal punishment may be inflicted, and to allege that it was sent to the plaintiff by the defendant. *Houston v. Woolley*, 15.

4. IN AN ACTION FOR FORECLOSURE OF MORTGAGE.—If, in an action under the statute for foreclosure of a mortgage, the debt consists of three notes, the petition should contain a separate count for each note. *Dewey v. Leonhardt*, 517.

5. QUANTUM MERUIT —A recovery cannot be held on an implied contract in opposition to an express contract in force, fixing the rights of the parties. *Clarke v. Kane*, 258.

PLEDGES.

1. DELIVERY OF BILLS OF SALE, WAREHOUSE RECEIPT, ETC.—The delivery, as collateral security, of a bill of sale, copies of gaugers' returns and a warehouse receipt of whiskey held in the United States bonded warehouse creates a pledge, and not a chattel mortgage. *Conrad v. Fisher*, 352.

2. PLEDGE MAY BE CREATED BY SYMBOLICAL DELIVERY. Where, from its situation, personal property is not susceptible of actual delivery, manual delivery is not essential to the creation of a pledge; it may be created by a symbolical delivery,—as by the delivery of a bill of parcels and a warehouse receipt. *Conrad v. Fisher*, 352.

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3. Attornment of warehouseman not necessary. The English doctrine which, in the case of a pledge by a symbolical delivery, requires an attornment by the warehouseman or other custodian of the goods, in order to create such a delivery as will support the pledge, is not in force in this country. *Conrad v. Fisher*, 352.

4. Warehouse receipt—for goods stored in the warehouse of the receipter.—The owner of goods stored in his own warehouse cannot make a valid pledge of them by issuing to another an instrument in the form of a warehouse receipt, in which he professes to hold the goods for that other. Such an attempt to create a pledge is void, as being contrary to the provisions of our statute relating to chattel mortgages, which requires a delivery of possession or a recording in the office of the recorder of deeds. (R. S. 1879, sec. 2503.) *Conrad v. Fisher*, 352.

5. As security for antecedent debt—pledgee not a bona fide purchaser for value.—Where goods which have been sold on credit remain in the possession of the vendor under such circumstances that his lien will revive upon the happening of the insolvency of the vendee, a pledge of the goods by the vendee to his creditor, as collateral security for an antecedent indebtedness, the creditor parting with no new value and making no agreement for delay, does not constitute the pledgee a purchaser for value, in such a sense as gives him a better right in respect of the goods than his pledgor. and cuts off the lien of the unpaid vendor. *Conrad v. Fisher*, 352.

6. When pledgee cannot invoke estoppel.—In such a case the pledgee of the vendee cannot be regarded as having a better right than the vendee, on the principle of estoppel, unless he shows that what has been said or done by the vendee has in some way influenced the conduct of the pledgee to his detriment. The law will not presume, in the absence of evidence, that such was the fact.

PRACTICE, APPELLATE.

1. Non-prejudicial error.—Error in rulings of the trial court, which is not prejudicial to the appellant, is no ground for the reversal of the judgment appealed from. *Straat v. Hayward*, 585.

2. ———. A judgment need not be reversed on account of an instruction which is inaccurate in expression, if the appellate court cannot see that it misled the jury to the prejudice of the appellant. *Sherwood v. Miller*, 48.

3. Points not raised in trial court.—The validity of a contract cannot be questioned on appeal, if not first questioned in the trial court. *St. Louis Ag'l, etc., Ass'n v. Delano*, 284.

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4. ——. A judgment should not, when appealed from, be affirmed upon a technical and doubtful question of pleading, which does not appear to have been distinctly raised in the trial court, and which, if so raised, could have been obviated by an amendment. *Leigh v. Springfield F. & M. Co.*, 542.

5. ERROR IN JUDGMENT OF TRIAL COURT.—Where there is error in the entry of the judgment, this court may reverse and remand the cause with instruction to enter up a judgment in proper form. *Garr v. Harding*, 24.

6. AMENDMENT OF JUDGMENT.—If, in an attachment proceeding, a special judgment against the attached property be rendered by the circuit court, the judgment may, on appeal, be amended so as to make it general. *Houston v. Woolley*, 15.

7. WEIGHING THE EVIDENCE.—The court of appeals will not interfere with a verdict found under proper instructions which are predicated on the evidence. *Jones v. Berry*, 125.

8. WEIGHING THE EVIDENCE ON TRIAL BY COURT.—This court will not disturb a finding of facts made by a trial court, sitting as a jury, if it be sustained by substantial evidence; nor will this court reverse the judgment of the trial court on the ground of error which is harmless. *Callahan v. Morse*, 189; *Conrad v. Fisher*, 352.

9. BILL OF EXCEPTIONS.—An objection to the ruling of a trial court in sustaining exceptions to a referee's report, urged upon the ground that these exceptions were not filed within the time prescribed by the statute, cannot be reviewed on appeal, when the date of the filing of such exceptions does not appear from the record by bill of exceptions. *Clarke v. Kane*, 258.

10. ——. The minutes of the clerk, copied into the transcript and showing that such exceptions were not filed in time, are not a part of the record, and will not be noticed on appeal. *Clarke v. Kane*, 258.

11. AFFIRMANCE FOR FAILURE TO FILE TRANSCRIPT.—In case of an affirmance for failure of the appellant to file a transcript, an affirmance with damages is not justifiable. *Treadway v. Parker*, 453.

12. JURISDICTION.—When a cause is transferred by the supreme court to one of the courts of appeals, the order of transfer must be treated as an adjudication that the court of appeals has exclusive jurisdiction of the appeal. *Syenite Granite Co. v. Bobb*, 483.

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13. SECOND APPEAL—RES ADJUDICATA.—When a case has been decided in the appellate court and again comes to such court on appeal, or by writ of error, only such questions will be noticed as were not determined in the previous decision; what was passed upon at the former hearing will be deemed *res adjudicata*, and no longer open to dispute or further controversy. *Belch v. Miller*, 628.

14. ABSTRACT—MOTION FOR NEW TRIAL.—When no question is made as to the existence of the motion for a new trial, or its sufficiency, it will not be assumed no such motion existed from the fact that it has not been set out in the abstract. *Updyke v. Wheeler*, 679.

15. AFFIRMANCE BECAUSE FOREIGN LAW NOT PROVED.—Where the rights of the parties depended upon the law of Kentucky, and this circumstance was not brought to the attention of the trial court by either party, and such law was not proved as a fact, the court declined to affirm the judgment as being for the right party, on the theory that the pledge under which the plaintiffs claimed was not by the law of Missouri a valid pledge, when the court knew, as a matter of general learning, that it was a valid pledge under the law of Kentucky. On the other hand, the court declined to reverse a judgment for the defendants which rested on the ground that the title of the plaintiff was that of a pledgee of warehouse receipts as collateral security for an ante cedent debt,—the law of Missouri on the subject being unsettled, and the law of Kentucky, by which the rights of the parties was governed, which had not been put in evidence in trial court, being, on the analogous subject of commercial paper, that a pledgee for an antecedent debt is not a taker for value, but holds subject to prior equities. *Conrad v. Fisher*, 352.

PRACTICE, TRIAL. See LAW AND FACT, 1.

1. FAILURE TO FILE INSTRUMENT SUED ON—MOTION TO DISMISS.—Plaintiff's petition was founded on a policy of insurance, charged to have been executed by the defendant, which he failed to file with the petition and to assign any reason therefor. On motion to dismiss, plaintiff seeks to avoid his failure to file the policy on grounds *aliunde* the petition, to-wit: That the application signed by plaintiff was part of the policy, and so the instrument sued upon was signed by both parties and is not required to be filed. *Held*, that the court must, in passing upon the motion, look to the petition and the instrument filed with it, or, if not filed, to the reasons for the omission shown in the petition. *McHoney v. German Ins. Co.*, 128.

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2. INSTRUMENT SIGNED BY BOTH PARTIES—IN FURTHERANCE OF JUSTICE, CAUSE REMANDED.—While the motion to dismiss should have been sustained. yet as it appears from the record of the trial that the policy was based upon an application signed by plaintiff and made a part of the contract, thereby making the contract in legal effect an instrument signed by both parties, it would better subserve the ends of justice to remand the cause that the petition may be amended so as to show the instrument to be a contract executed by both parties, and therefore that it is not necessary to file it. *McHoney v. German Ins. Co.*, 218.

3. CROSS-EXAMINATION OF WITNESSES.—A witness may be cross-examined upon any issue on trial, without becoming the witness of the cross-examiner as to matters in regard to which he was not examined on his direct examination. *Jones v. Roberts*, 163.

4. DEMURRER TO EVIDENCE ON ONE OF SEVERAL ISSUES.—A demurrer to the evidence on any one of several issues on trial is not proper practice; a direct instruction that the evidence is insufficient should be asked. *Jones v. Roberts*, 163.

5. ADMISSIONS BY ONE OF SEVERAL DEFENDANTS.—Evidence, competent against one of several defendants but not against the others, must be admitted, but those against whom it is not competent may have its effect limited by instruction. *St. Louis, etc., Ass'n v. Delano*, 284.

6. OBJECTIONS TO FILING OF EXCEPTIONS TO REFEREE'S REPORT.—Such objection comes too late when not made in the trial court at the time of the filing of the exceptions to the referee's report, but first presented by motion for a new trial after these exceptions are sustained. *Clarke v. Kane*, 258.

7. VERDICT IN REPLEVIN.—The verdict in an action of replevin may be in favor of the plaintiff for a part of the property, and of the defendant for the balance. *Updyke v. Wheeler*, 679.

8. GRANTING NEW TRIAL CONDITIONALLY.—It is erroneous for a circuit court to attach to an order, granting a defendant a new trial, a condition requiring the defendant to give bond for the payment of any judgment thereafter rendered against him in the cause. *Dewey v. Leonhardt*, 517.

9. MOTION IN ARREST.—The allegation in such a motion, that "on the whole record plaintiffs should have recovered," presents no ground for complaint, when under the pleadings in the cause the burden of proof is upon the plaintiffs. *Wilkerson v. Bruce*, 156.

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10. BILL OF EXCEPTIONS—MAKING PART OF RECORD—DUTY OF JUDGE. Under the provisions of our statute law there is no way to complete and perfect the record by adding thereto the matters contained in the bill of exceptions, unless the judge of the trial court shall act in the matter. If the bill when presented is true the judge should sign it; if untrue he should refuse to sign for that reason and certify thereon the cause of such refusal. If, after such refusal, three bystanders sign said bill and it be again presented, the judge, if he believe it to be true, should permit the same to be filed, and, if he refuse to permit such bill to be filed, he should certify that it is untrue, and the issue whether the bill is true or untrue will be tried by the appellate court on affidavits as provided by the statute. *State ex rel. Millet v. Field*, 83.

11. ERROR CORAM VOBIS, OFFICE OF—DEATH OF DEFENDANT.—The office of a writ of error *coram vobis* is to bring to the court's attention and correct some error of fact which did not appear in the record, and which was unknown to the court, such as, that one of two defendants was dead at the time of entering judgment, as in this case. *Dugan v. Scott*, 662.

12. PRODUCTION OF BOOKS.—Right of party, producing books at the instance of the other party, to put the same in evidence though otherwise incompetent. *Anchor Milling Co. v. Walsh*, 567.

PRESUMPTIONS.

1. CONSIDERATION, PRESUMPTION OF.—Under Revised Statutes, 1879, section 663, not merely non-negotiable promissory notes, but all promises in writing, for the payment of money or property, whether conditional or absolute, import a consideration. *Wulze v. Schaeffer*, 551.

2. BANK CHECK.—A check is presumed, *prima facie*, to have been given for value. *Newcomb v. Jones*, 475.

3. FROM FAILURE TO PRODUCE EVIDENCE.—Ordinarily the failure to call as a witness one, who is equally within the control of both parties, will be no ground for any presumption against either party, and the unexplained silence of a party, though it in some cases adds force to the evidence of his adversary, is not sufficient to supply independent evidence of a fact, which is wholly unproved by the other evidence. *Diel v. Mo. Pac. Ry. Co.*, 454.

4. FOREIGN LAW—IN CASE NOT PROVED.—The burden of proving the law of another state rests upon the party claiming rights under it, and in the absence of such proof the trial court is authorized to presume that the same rule of law which obtains in this state obtains in that state, it being founded in the principles of the common law, and not the necessary outgrowth of a local and peculiar statute. *Conrad v. Fisher*, 352.

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PRINCIPAL AND AGENT

1. COMMISSIONS OF REAL-ESTATE BROKER.—If property is placed in the hands of a real-estate agent for sale, and a sale is brought about through the exertions of the agent, he is entitled to his commissions, even though the negotiations are conducted, and the sale concluded, by the owner of the land and the purchaser. *Jones v. Berry*, 125.

2. RESCISSION OF AGENCY.—While the property in such a case remains unsold, the owner of it, in order to rescind the agency on the ground of the failure of the agent to make proper efforts to sell it, must give notice to the agent of the rescission. *Jones v. Berry*, 125.

3. DECLARATIONS OF AGENT OR ALLEGED AGENT—WHEN ADMISSIBLE IN EVIDENCE, AND WHEN NOT. See Evidence, 1, 2, 3.

PRINCIPAL AND SURETY.

1. ALTERATION OF CONTRACT.—If a contract be altered by the principal without the consent of the surety, so as to destroy its identity, the surety is discharged, and whether the alteration was for his benefit is immaterial. *Warden v. Ryan*, 466.

2. ———. The new agreement being executed and binding, the fact that the original contract was in writing, and that it was changed without the consent of the principal, so as to make it conform to the new agreement, is immaterial. *Warden v. Ryan*, 466.

PROMISSORY NOTES. See BILLS AND NOTES.

QUO WARRANTO.

1. AGAINST CORPORATIONS.—An action of *quo warranto* instituted against a corporation admits the corporate existence, and does not lie when the corporation is not charged with misuser or non-user of corporate franchises granted to it, nor with the usurpation of franchises not granted to it. *State ex rel. v. Hannibal, etc., Road Co.*, 496.

2. ———. The validity of the title of the corporation acquired by such purchase cannot be determined in an action of *quo warranto*. *State ex rel. v. Hannibal, etc., Road Co.*, 496.

RAILROADS.

1. DEMURRER TO EVIDENCE.—Where a fire started inside defendant's right of way and burned along its fence into and destroyed plaintiff's pasture, and there is no evidence showing how the fire originated, or that any engine or train of the defendant had passed on the day of the fire, there is such lack of evidence as warranted the withdrawal of the case from the jury, and a demurrer to the evidence should have been sustained. *Alexander v. Railroad*, 609.

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2. Killing stock—depot grounds.—In an action against a railroad under section 809, Revised Statutes, 1879, plaintiff's evidence tended to show that the cow killed got upon the track within a space outside the town limits, and between the head of the switch and the cattle-guard—a distance of one hundred and forty feet, and defendant's uncontradicted evidence showed that the cattle-guard and the fence could not be placed nearer the head of the switch without hindering the transaction of its business, and endangering the lives of its employes in switching its trains; *held*, plaintiff could not recover. *Jennings v. Railroad*, 650.

3. Fencing right of way.—Where defendant has operated its road for years through a field, and has never built fences along the sides of its right of way, but only placed a cattle-guard at its entry into such field, and in repairing and improving its road bed and track, it removes said cattle-guard for a week or more, and stock passed into said field and destroyed the crop, defendant is liable under section 809, Revised Statutes, 1879, and cannot defend by the fact it kept a watchman there, or on the theory that it is entitled to a reasonable time to repair fences along the right of way, after the discovery of defects. *Shotwell v. Railroad*, 658; *Gordon v. Railroad*, 661.

RECEIVER.

For proceedings against receiver for contempt of court in not complying with order of court to pay over funds, see *Ex parte Haley*, 562.*

REFEREE.

1. Finding of referee in actions at law and suits in equity.—In actions at law the finding of a referee is considered as a special verdict, and appellate courts will not weigh the evidence for the purpose of overturning it; but in equity cases, where the parties have not a right to a trial by jury, a referee's finding may be reviewed on the evidence taken. *Bender v. Markle*, 284.

2. Finding of referee as to law and facts—what and when set aside.—While in law actions the finding of the referee, as to the facts, is a special verdict, yet, if his conclusions of law from such facts are erroneous, such conclusions will be set aside. *Bender v. Markle*, 284.

3. Objection to filing of exceptions as out of time.—An objection to the filing of exceptions to a referee's report, because they were not filed within the time prescribed by statute, comes too late when not made at the time of the filing of these exceptions, but first presented by motion for new trial. *Clarke v. Kane*, 258.

* See *Quaere* in *Ex parte Millett*, p. 76, indexed under Contempt, 2.

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REPLEVIN.

1. PLAINTIFF MUST SHOW RIGHT IN HIMSELF — POSSESSION. — In replevin though it appear defendant has no right to keep the property, yet plaintiff must show property, general or special, in himself. Lawful possession is good against a wrongdoer. *Updyke v. Wheeler*, 679.

2. VERDICT. —A verdict in action of replevin, involving the ownership of property consisting of a variety of articles may be in favor of plaintiff for a part and defendant for the remainder. *Updyke v. Wheeler*, 679.

RES ADJUDICATA. See JURISDICTION, 4; PRACTICE, APPELLATE, 12.

SALES.

1. VENDOR'S LIEN.—For full discussion of subject of vendor's lien in its various phases, and of right of stoppage *in transitu*, together with consideration at length of the authorities on these subjects, see *Conrad v. Fisher*, 352.

2. DAMAGES FOR BREACH OF WARRANTY. See Damages, 2.

SPECIAL TAXES.

1. SPECIAL TAX BILLS—ASSIGNABILITY OF.—Special tax bills for public work are assignable, and suit thereon may be brought in the name of the assignee. *Bambrick v. Campbell*, 460.

2. PENAL INTEREST.—The institution of suit on such special tax bill is equivalent to a demand of payment for the determination of the right to penal interest on the tax bill. *Bambrick v. Campbell*, 460.

3. ATTACHMENT IN ACTIONS.—The remedy by attachment in actions against non-residents of the state being authorized by the charter of the city of St. Louis, a general writ of attachment may issue in such actions, and a special levy may be made under it on the property, against which the special tax bill is issued. *Syenite Granite Co. v. Bobb*, 483.

4. COMPLIANCE WITH LAW.—In order to fasten a liability for street improvements upon abutting property, a strict compliance with the conditions imposed by the law authorizing the assessment of the property is necessary. *Fruin-Bambrick Con. Co. v. Geist*, 509.

5. PUBLIC WORK, VALIDITY OF ORDINANCE FOR.—An ordinance of the city of St. Louis is not invalid, because, after its introduction, the municipal assembly submitted it to the board of public improvements with the suggestion of an amendment, and that board embodied the amendment in it, and returned it and recommended its passage, without altering the endorsement of the estimated cost of the improvement, made on the original draft of it. *Bambrick v. Campbell*, 460.

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6. ———. It is not necessary that such ordinance should contain a provision for advertisement for bids for the work; advertisement which is in compliance with the requirements of the charter and ordinance for advertisement for bids for the purchase of supplies, will suffice. *Bambrick v. Campbell*, 460.

7. ———. Under the charter of St. Louis, which requires the unanimous approval of all the members of the board of public improvements in the case the owners of the major part of the property on the line of a proposed improvements shall remonstrate against the same, a finding by said board that a remonstrance in writing presented to it was not signed by the required major part of such owners is not conclusive. *Fruin-Bambrick Con. Co. v. Geist*, 509.

8. ———. Under said charter provision it is not necessary that an owner should sign in person; his authorized agent may sign for him. *Fruin-Bambrick Con. Co. v. Geist*, 509.

9. ——— RECORDS OF BOARD OF PUBLIC IMPROVEMENTS OF ST. LOUIS.—Said charter impliedly requires said board to keep a record of its proceedings, and such record may be used as evidence to show non-compliance with said charter provision. *Fruin-Bambrick Con. Co. v. Geist*, 509.

ST. LOUIS, CITY OF. See SPECIAL TAXES, 5, 6, 7, 8 and 9.

1. CHARTER PROVISION, CONSTRUCTION OF.—The provision of the charter of the city of St. Louis, providing that no bill should contain more than one subject, is intended to prohibit a practice of joining in the same bill incongruous subjects having no relation or connection with each other, and does not invalidate an ordinance which provides both for the grading and the paving of an alley. *Weber v. Johnson*, 601.

2. ———. Nothing in said charter requires the municipal assembly of said city to fix the elevation of an alley before ordering its improvement. *Weber v. Johnson*, 601.

STOPPAGE IN TRANSITU. See SALES.

SUNDAY.

1. ISSUE OF WRIT OF ATTACHMENT ON SUNDAY. See Attachment, 4.

2. VALIDITY OF CONTRACT FOR ATHLETIC GAMES ON SUNDAY. See Contract, 8.

TROVER AND CONVERSION.

CONVERSION—ATTACHMENT—EVIDENCE TO SHOW A CONVERSION BY ONE OF SEVERAL ATTACHING CREDITORS.—A collection of facts stated, in which it appeared that several attachments were sued out by different creditors of a common debtor, apparently at the

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same time, all of them acting through the same attorney; that the different writs came into the hands of the sheriff within a few minutes of each other; that they were all levied on the following day, apparently at the same time; and that subsequently, on motions of the several plaintiffs, the suits were consolidated and proceeded to judgment together. It is *held* that this evidence exhibited such a concert of action as authorized the trier of the facts to find that all the attaching creditors were joint actors, and that either of them was guilty of a conversion in case any of the levies should be adjudged tortious. *Conrad v. Fisher*, 352.

UNITED STATES, STATUTES OF. See ADMINISTRATION, 2, 3; INTERNAL REVENUE, 1.

VALUE.

SALES AS EVIDENCE OF VALUE. See Evidence, 15.

WILLS.

1. BURDEN OF PROOF. In an action in which the validity of a will is contested, the burden of proof is upon the party upholding the will. *Jones v. Roberts*, 163.

2. UNDUE INFLUENCE—BURDEN OF PROOF.—When in such an action undue influence in procuring the execution of the will is charged, the burden of proof on this issue is upon the contestant; but if a confidential relation between the testator and legatee is established a presumption of the exertion of undue influence by the latter arises, and the burden of proof shifts to him. *Jones v. Roberts*, 163.

3. UNDUE INFLUENCE.—The exertion of influence by means of an appeal to gratitude for past services or to pity because of the needy circumstances or condition of a party or by means of reasonable and proper argument, is legitimate. *Jones v. Roberts*, 163.

4. DECLARATIONS OF TESTATOR—ADMISSIBILITY OF. See Evidence, 5.

WITNESSES.

1. PRESUMPTIONS FROM FAILURE TO CALL.—The failure of a party to call a witness who is equally within the control of both parties is no ground for an unfavorable presumption. *Diel v. Railroad*, 454.

2. CROSS-EXAMINATION OF. See Practice, Trial, 8.

3. MEMORANDA TO REFRESH MEMORY, USE OF. See Evidence, 10.

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

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RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver, or return of service endorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the

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bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE.—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS.—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*) "*Summons issued on the—day of—*, 188-, *executed on the—day of—*, 188-;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned

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pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this Court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent or defendant in error shall, at least eight days before the

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day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court seven copies of the same; and the counsel for appellant or plaintiff in error may, if he desires, within five days after the service on him of the respondent's or defendant in error's abstract and brief as aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless, for good cause shown, the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or,

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at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the Court thereupon and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed, and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question, decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of

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itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the court for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given.

Attest:

F. C. FARR, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing, signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. The rule has no application to causes whereof this court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the clerk's office within five days after taking the same.

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RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the Clerk of the Trial Court to send up a complete transcript, when the transcript of the record is formally insufficient.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS. WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court

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of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS. WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERKS IN MAKING OUT TRANSCRIPTS. The Clerks of the several Circuit Courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court,

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set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the — day of — 188–, executed on the — day of —, 188–;*" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill or exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the clerk of the court, at least one day before the cause is called for trial, four copies of a brief, containing—*First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the

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cause is called for hearing, delivered to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the court shall otherwise direct.

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RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at its discretion, continue or reset the cause, on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the

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appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

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RULE 25.—APPEARACNE OF COUNSEL. The Counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties respectively, in this Court; but should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant or the plaintiff in error ten days, and the counsel for the respondent or the defendant in error five days, before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

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